# Supreme Court of the United States

OCTOBER TERM, 1970

## No. 299

PAUL ROBERT COHEN, *Appellant,*

—v.—

CALIFORNIA

APPEAL FROM THE COURT OF APPEAL OF CALIFORNIA, SECOND APPELLATE DISTRICT

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IN THE MUNICIPAL COURT OF
LOS ANGELES JUDICIAL DISTRICT
COUNTY OF LOS ANGELES, STATE OF CALIFORNIA

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476373

THE PEOPLE OF THE STATE OF CALIFORNIA, PLAINTIFF

*vs.*

PAUL ROBERT COHEN, DEFENDANT

COMPLAINT—Filed April 29, 1968

Personally appeared before me, the undersigned, who, first being duly sworn, complains and says: That on or about Apr. 26, 1968, at and in Los Angeles City, in the County of Los Angeles, State of California, a misdemeanor, to-wit: VIOLATION of Section 415 of the Penal Code of the State of California was committed by PAUL ROBERT COHEN (whose true name to affiant is unknown), who at the time and place last aforesaid, did wilfully and unlawfully and maliciously disturb the peace and quiet of the neighborhood of 110 North Grand and the peace and quiet of this complainant and other persons then and there being present, by then and there, engaging in tumultuous and offensive conduct. All of which is contrary to the law in such cases made and provided, and against the peace and dignity of the People of the State of California. Said Complainant therefore prays that a warrant may be issued for the arrest of said Defendant that he may be dealt with according to law.

Subscribed and sworn to before me on Apr. 29, 1968.

/s/ H. A. Spearman
H. A. SPEARMAN
GEORGE J. BARBOUR
Clerk of the Municipal
Court of Los Angeles
Judicial District, in said
County and State

By _____
Deputy Clerk

May 13, 1968

I hereby certify this to be a true and correct copy of the original Complaint on file in this office, GEORGE J. BARBOUR, Clerk of Municipal Court of Los Angeles Judicial District, County of Los Angeles, State of California.

By /s/ K. Beth Spratt
Deputy

[SEAL]

(Form P.C. 415)

IN THE MUNICIPAL COURT
OF LOS ANGELES JUDICIAL DISTRICT

IN THE COUNTY OF LOS ANGELES
STATE OF CALIFORNIA

[Filed Nov. 8, 1968, William G. Sharp, County Clerk, by V. Willis, Deputy.]

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No. 310996

Cr. A 8258

THE PEOPLE OF THE STATE OF CALIFORNIA

*vs.*

PAUL R. COHEN

| Date Posted | Appearance Date | Amount | Receipt or Bond No. | Surety |
|---|---|---|---|---|
| APR 29 1968 | MAY 1 1968 | 625— | 9931 | NAT |

| Date | |
|---|---|
| Apr. 29, 1968 | Complaint filed declared to by H. A. Spearman charging the Defendant with having on Apr. 26, 1968 at Los Angeles City, in the County of Los Angeles, State of California, committed a misdemeanor, to-wit: Viol. of Sec. 415 P. C. |
| May 1, 1968 | BRENT PERRY SHAW. Report is ordered to take down as provided by law. Illegible. |
| | Case called, Judge Mary E. Waters, Judge presiding. |

| Date | |
|---|---|
| May 1, 1968 | Both parties ready. People represented by Jan A. Connor, (D.C.A.) Defendant represented by K. Wissot, Deputy Public Defendant for arraignment only. Defendant in court, duly arraigned, informed of the charge/s against him and of his legal rights. Defendant gives true name as charged and enters his plea of not guilty of the offense charged.<br><br>Defendant with counsel in open court each personally demands jury trial. Defendant instructed to appear personally for trial. Trial set for May 15, 1968, 9 A.M. in Div. 20. Bail $625 incl. P.A., Bail to Stand. |
| May 10, 1968 | In the following case Arthur Radon Reporter is ordered to take down procedings as provided by law.<br><br>Cause Called. Judge [Illegible] Presiding. Both parties ready. People represented by David Perez (D.C.A.) Defendant not in court but represented by Sperbey by Nimmer.<br><br>Motion by defendant for advance continuance Granted. Cont. to 6/10 1968, 8:30 A.M. Div. 20. Deft. waives statutory time. Bail up to stand. (for trial) |
| Illegible | Notice if Motion & Motion to Supress Evidence on constitutional grounds filed. |
| Illegible | In this case Patricia A. Minter Reporter is ordered to take down proceedings as provided by law. Div. 20 convened at M., Cause called. Judge Robert Fainer presiding. Both parties ready. People represented by David Perez. (D.C.A.) Defendant not in court but represented by M. Nimmer; E. B. Nisbet Deputy Clerk; Cause advanced for purpose of motion |

| Date | |
|---|---|
| Illegible | Court put on notice that motion to dismiss will be made on 6-10-68 at 8:30 Div. 20. |
| | BAIL UP TO STAND |
| Illegible | In this case Mildred Herr Reporter is ordered to take down proceedings as provided by law. Div. 20 convened at M., Cause called. Judge Robert Fainer presiding. Both parties ready. People represented by David Perez (D.C.A.) Defendant in court and represented by M. Nimmer; E. B. Nisbet Deputy Clerk; People's motion for continuance. Cause continued to 8-16-68, 1:30 A.M. Div. 20 for hearing on motion. Defendant waives time. |
| | BAIL UP TO STAND |
| Illegible | Defendants memo of Points and Authorities in support of his motion to suppress evidence on constitutional grounds filed this date. Error. |
| Illegible | Points and authorities in opposition to defendants motion filed with Affidavit of Service by mail. |
| Illegible | Defendants reply memo in support of his motion to suppress evidence on constitutional grounds, with affidavit of service by mail filed this date. |
| Aug. 16, 1968 | In this case Elias J. Papachrisios Reporter is ordered to take down proceedings as provided by law. Div. 20 convened at M., Cause called. Judge David J. Aisenson presiding. Both parties ready. People represented by Robert W. Thomas (D.C.A.) Defendant in court and represented by Melvill B. Nimmer; E. B. Nisbet Deputy Clerk; Defendant's motions to continue. |

| Date | |
|---|---|
| Aug. 16, 1968 | Cause continued to 9-4 1968 1:30 P.M. for hearing on defendant's motion to suppress.<br><br>DEFENDANT WAIVES TIME<br>BAIL UP TO STAND |
| Illegible | In this case Erwin Goodman Reporter is ordered to take down proceedings as provided by law. Div. 20 convened at . M., Cause called. Judge David J. Aisenson presiding. Both parties ready. People represented by Robert W. Thomas (D.C.A.) Defendant in court and represented by Melville B. Nimmer; E. B. Nisbet Deputy Clerk; Motion to suppress off calendar.<br><br>Case continued for trial to 9-27-68 8:30 A.M. Time waived. Bail to stand. |
| Sep. 27, 1968 | In this case [illegible] Reporter is ordered to take down proceedings as provided by law. Div. 20 convened at M., Cause called. Judge Robert Fainer presiding. Both parties ready. People represented by Robert W. Thomas (D.C.A.) Defendant in court and represented by Melville B. Nimmer; Henry P. Baum Deputy Clerk; transferred to Div. 21 for trial. |
| Sep. 27, 1968 | In this case Arlene Jenkins Reporter is ordered to take down proceedings as provided by law. Div. 21 convened at 10:35 A.M. Cause called. Judge James Harvey Brown presiding. Both praties ready. Defendant in court and represented by Melville B. Nimmer PD Shirley Estes Deputy Clerk. People and Defendant and his counsel in open court each personally waives jury trial.<br><br>Witness for State:<br><br>Houston Splawn |

| Date | |
|---|---|
| Sep. 27, 1968 | At 10:40 A.M. Cause recessed to 10:50 A.M. At 10:50 A.M. Cause called. Stipulated that jury and all other parties are present as before |
| | Witnesses for State: Continued |
| | People's Exhibits: |
| | Houston Splawn—resumes testimony |
| | 1. Blue levi jacket with writings<br>Defendants objection to introduction of Peoples Exhibit I overruled<br>At 11:15 A.M. Cause recessed to 11:20 A.M. At 11:20 A.M. Cause called. Stipulated that all parties are present as before. |
| | Witnesses for State: Continued<br>Cathryn Scholler<br>John A. Alexander |
| | People rest |
| | Defendants motion pursuant to section 1118 Penal Code |
| | Defendants Memorandum of Points and Authorities in support of Defendants motion for entry of Judgment of Acquittal filed. |
| | At 2:10 P.M. Cause called. Stipulated that all parties are present as before |
| | Defendants motion argued |
| | Defendants motion pursuant to section 1118 |
| | Penal Code is denied |
| | Witnesses for Defendant:<br>Paul Robert Cohen |
| | Defendant rests |

| Date | |
|---|---|
| Sep. 27, 1968 | Both sides rest |
| | Cause argued |
| | Defendant adjudged ✔ guilty as charged |
| | Defendant waives time for sentence |
| | Cause continued for sentence to Oct. 3, 1968 at 1:30 P.M. Div. 21 |
| | Bail up to stand |
| Illegible | In this case Arlene Jenkins Reporter is ordered to take down proceedings as provided by law. Div. 21 convened at 1:30 P.M., Cause called. Judge James Harvey Brown presiding. Both parties ready. People represented by Sueanne Lewis (D.C.A.) Defendant ✔ in court and represented by Melville Nimmer; Shirley Estes Deputy Clerk; Defendant appearing in court for sentence |
| | Defendant in court and having been duly arraigned for judgment, and there being no legal cause why judgment should not be pronounced, "It is adjudged and ordered by the Court that, as a punishment for the crime of violation of section 415 PC the defendant shall be imprisoned in the County Jail of the County of Los Angeles for the term of 30 days, and that said defendant shall be discharged from imprisonment upon the expiration of said term." |
| | Defendants notice of appeal filed this date |
| | BAIL ORDERED EXONERATED as to original bond |
| | Bail on appeal set in the sum of $500.00 plus $125.00 P.A. |

| Date | |
|---|---|
| Illegible | $625.00 appeal bond posted — Includes $125.00 P.A. United Bonding Insurance Co. Bond #3 G 84601 ck |
| Illegible | Respondent notified by mail of the filing of notice of appeal. |
| Illegible | Proposed statement on appeal filed, with affidavit of service by mail. |
| Illegible | Respondent's Amendments to Appellant's Proposed Statement on Appeal filed, with affidavit of service by mail. (LATE) |
| Illegible | Hearing to settle Statement on Appeal set for October 30, 1968 at 9:30 A.M. in Division 21. |
| | Notices mailed, with affidavits of service by mail. |
| Illegible | In this case No Reporter is ordered to take down procedings as provided by law. Div. 21 convened at 9:30 A.M., Cause called. Judge James Harvey Brown presiding. Both parties ready. People represented by David Ellis (D.C.A.) Defendant in court and represented by Melville B. Nimmer; C. Hegler Deputy Clerk; Hearing to settle statement on appeal. The court does now settle and allow the foregoing statement on appeal and certifies that the same is a true and correct statement of the proceedings had in the above action. |

IN THE APPELLATE DEPARTMENT
OF THE SUPERIOR COURT
OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

Superior Court No. CR A 8258
Trial Court No. 310996

PEOPLE OF THE STATE OF CALIFORNIA,
PLAINTIFF AND RESPONDENT

*vs.*

PAUL ROBERT COHEN, DEFENDANT AND APPELLANT

ON APPEAL FROM THE MUNICIPAL COURT OF THE
LOS ANGELES JUDICIAL DISTRICT, COUNTY OF
LOS ANGELES, STATE OF CALIFORNIA
JAMES HARVEY BROWN, Judge

This cause having been argued and submitted and fully considered, judgment is ordered as follows:

It is ORDERED and ADJUDGED that the judgment made and entered in the Municipal Court of the Los Angeles Judicial District County of Los Angeles, State of California, in the above entitled cause be and the same is hereby reversed.

MEMO—January 20, 1969

In the corridors of the courthouse the appellant wore a jacket bearing the words "Fuck the Draft." He was convicted under a criminal complaint charging him with "engaging in tumultuous and offensive conduct" in violation of Penal Code Section 415. There was no evidence that the conduct of the appellant was tumultuous, and conduct that is merely offensive is insufficient (see *Terminiello* vs. *Chicago* [1948] 337 U.S. 1; *People* vs. *Huss* [1966] 241 Cal. App. 2d 361, 366). Appellant may have been guilty of other offenses, but he was not guilty of the offense of which he was convicted.

Judgment vacated per order of February 13, 1969

We concur:

WONG
Judge

WHYTE
Presiding Judge

VASEY
Judge

APPELLATE DEPARTMENT
OF THE SUPERIOR COURT
OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

Superior Court No. CR. A. 8258
Trial Court No. 310996

PEOPLE OF THE STATE OF CALIFORNIA,
PLAINTIFF AND RESPONDENT

*vs.*

PAUL ROBERT COHEN, DEFENDANT AND APPELLANT

ORDER GRANTING REHEARING—Dated: February 13, 1969

The petition of respondent for a rehearing after judgment of this court on appeal, in the above entitled matter, having been filed and having been duly considered,

IT IS ORDERED that said petition be granted, and the judgment of this court heretofore rendered in said case is vacated. Said case is placed on the calendar for further argument at 9:30 a.m. on March 6, 1969.

While the matter is open for full reargument on all matters including Constitutional questions, attention is directed to the questions of statutory construction as applied to Penal Code § 415 involved in this appeal.

BY THE COURT

WHYTE
Presiding Judge

VASEY
Judge

WONG
Judge

APPELLATE DEPARTMENT
OF THE SUPERIOR COURT
OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

Superior Court No. CR. A. 8258
Trial Court No. 310996

PEOPLE OF THE STATE OF CALIFORNIA,
PLAINTIFF AND RESPONDENT

*vs.*

PAUL ROBERT COHEN, DEFENDANT AND APPELLANT

MEMORANDUM OPINION AND JUDGMENT—May, 23, 1969

Appeal by defendant from judgment of the Municipal Court of the Los Angeles Judicial District, James Harvey Brown, Judge.

Judgment reversed.

For Appellant—Melville B. Nimmer

For Respondent—Roger Arnebergh, City Attorney
Michael T. Sauer, Deputy City Attorney

—oOo—

In the corridor of the Courthouse, appellant wore a jacket upon which were inscribed the words "Fuck the Draft." Women and children were present in the corridor. Appellant neither engaged in, threatened, nor incited any acts of violence, nor were any other persons in the said corridor engaged in, threatening, or about to engage in acts of violence. Appellant at no time caused the emission of any loud or unusual noises. Someone other than appellant had placed the words "Fuck the Draft" on his jacket, but appellant was aware that such words were on the jacket at the time he wore it. He stated that by wearing the jacket as thus inscribed, the public was made aware of the depth of feeling against the draft

shared by himself and his friends, and that he had no wish to vex, annoy, or injure others.

Appellant was charged and convicted with disturbing the peace, in violation of Penal Code Section 415, and sentenced to thirty days in jail. He has appealed from the judgment of conviction.

It is apparent that appellant was arrested solely because of the words which were inscribed on the jacket. Appellant contends that Penal Code Section 415 as construed and applied by the trial court constituted an abridgment of appellant's constitutional right of free speech guaranteed by the First Amendment. Respondent, on the other hand, urges that the right of free speech is not absolute, but must be balanced against other public interests.

We find it unnecessary to decide the constitutional issue, since this case presents primarily a problem of statutory construction.

Appellant was charged and convicted under the portion of Penal Code Section 415 which prohibits disturbing the peace "by tumultuous *or* offensive conduct."

Respondent contends that since the statute is in the disjunctive, evidence sufficient to support a finding of either "tumultuous" conduct or "offensive" conduct will sustain a conviction. Respondent concedes that the conduct of the appellant was not "tumultuous" but urges that it was "offensive" and hence sufficient to uphold the conviction.

We agree that the appellant's conduct was "offensive", but not "tumultuous". We do not agree, however, that the problem of statutory construction can be solved by simply ascertaining whether the statute is in the disjunctive or in the conjunctive.

Although ordinarily the word "and" connotes conjunctive, and the word "or" connotes disjunctive or alternative, when necessary to harmonize the provisions of a statute or give effect to all its provisions, the word "or" may be read as "and" or conversely (*Bianco* vs. *Industrial Accident Commission* [1944] 24 Cal. 2d 584, 587; *People* vs. *Wright* [1955] 131 Cal. App. 2d Supp. 853, 862).

In order to ascertain the scope of the provision under which appellant was convicted, we will examine the scope of the common law crime known as "breach of the peace" or "disturbance of the peace" and the scope of the other provisions of Penal Code Section 415, the California "disturbance of the peace" statute.

Although there are no common law crimes in California, the common law may be a proper source of interpretation of a criminal statute to avoid fatal uncertainty or to assist in proper interpretation of a statute (1 Witkin, Cal. Crimes, p. 27).

It seems clear that not every misdemeanor is a breach of the peace, and that it is essential to show, as an element of the offense, a disturbance of public order and tranquillity by acts or conduct not merely amounting to unlawfulness, but tending also to create public tumult and to incite others to break the peace (12 Am. Jur. 2d 666).

A breach of peace is a public offense done by violence, or one causing or likely to cause an immediate disturbance of public order (Rest., Torts, Sec. 116).

The California Legislature in enacting Penal Code Section 415 specifically defined the acts which constitute disturbing the peace. In addition to "tumultuous or offensive conduct", the statute prohibits (1) loud or unusual noise; (2) threatening, traducing, quarreling, challenging to fight; (3) fighting; (4) horse racing on public streets; (5) firing of guns; (6) using any vulgar, profane, or indecent language within the presence of women and children, in a loud and boisterous manner.

It is to be noted that each of the prohibited acts contain elements of noise, disturbance, or conflict. This is consistent with the common law concept of "breach of the peace".

On the other hand, if we disregard the word "tumultuous" as the respondent suggests, then a person could be convicted of disturbing the peace whenever his conduct was "offensive" even in the absence of any tumult, noise, or conflict. Under such an interpretation, one could be convicted of disturbing the peace even though the "offensive" conduct was quiet and peaceful. Such an inter-

pretation is wholly inconsistent with the common law concept of disturbing the peace and wholly inconsistent with the other provisions of Penal Code Section 415.

Moreover, any suggestion that the Legislature intended to make all "offensive" conduct punishable as disturbing the peace would subject the statute to attack on the ground that it was vague and indefinite. It would be vague and indefinite because the statute would fail to indicate in what respect the conduct must be "offensive". For example, if one is engaged in such offensive conduct as picking his nose in public or failing to use the proper deodorant, could he be held guilty of disturbing the peace? These uncertainties could be avoided by limiting the "offensive" conduct to that which is also "tumultuous."

It is our opinion that the Legislature did not intend to punish as disturbing the peace "offensive" conduct that was quiet and peaceful, but only that which was "tumultuous". Accordingly, we hold that the prohibition against engaging in "tumultuous *or* offensive conduct" should be construed to read "tumultuous *and* offensive conduct".

In the present case, the appellant's conduct, while reprehensible, was quiet and peaceful. He neither engaged in, threatened, nor incited any acts of violence. Moreover, it is conceded by the prosecution that appellant's conduct was not "tumultuous". In the absence of conduct that was "tumultuous *and* offensive", the appellant was not guilty of disturbing the peace in violation of Section 415 of the Penal Code.

Deserving of additional comment is the provision of Section 415 expressly prohibiting "vulgar, profane, or indecent language." At common law, language itself, no matter how abusive and insulting, did not constitute a breach of peace. This rule is summarized in 11 Corpus Juris Secundum 819 as follows:

> "Unless so provided by statute, abusive and insulting language will not constitute a breach of the peace, where there is no threat of, or incitement to, immediate violence."

The California Legislature in 1877 amended Penal Code Section 415, to prohibit the use of "any vulgar, profane,

or indecent language within the presence or hearing of women or children, in a loud and boisterous manner" (Code Am. 1877-78, Chap. 299, p. 117). In so doing, the Legislature imposed two limitations upon prosecutions under the said provision: (1) that the offense must be committed within the presence or hearing of women and children, and (2) that it be in a loud and boisterous manner. Thus, it has been held that there may not be a conviction under this portion of 415 unless there is an allegation and proof that such language was used "in a loud and boisterous manner" and that this phrase was "a very necessary matter to complete the offense". *Ex parte Boynton* [1905] 1 Cal. App. 294. In the present case, there was neither such allegation nor proof.

The settled statement in this case disclosed that the trial court held that appellant could be convicted for violation of that portion of Section 415 prohibiting the use of "vulgar, profane, or indecent language within the presence of women and children, in a loud and boisterous manner", despite the fact that the complaint only charged the appellant with "engaging in tumultuous and offensive conduct." In so doing, the court erred. "Conviction upon a charge not made would be sheer denial of due process." (*De Jonge* vs. *Oregon* [1936] 299 U.S. 353, 362.)

The judgment is reversed.

Dated May 23, 1969.

We concur:

WONG
Judge

WHYTE
Presiding Judge

VASEY
Judge

MELVILLE B. NIMMER
715 Malcolm Avenue
Los Angeles, California
Telephone: 825-1485
Attorney for Defendant-Appellant

IN THE MUNICIPAL COURT OF THE
LOS ANGELES JUDICIAL DISTRICT
COUNTY OF LOS ANGELES
STATE OF CALIFORNIA

No. 310 996

PEOPLE OF THE STATE OF CALIFORNIA, PLAINTIFF

—*vs*—

PAUL ROBERT COHEN, DEFENDANT

SETTLED STATEMENT ON APPEAL

Defendant-Appellant hereby submits this proposed settled statement on appeal.

I

STATEMENT OF ORAL PROCEEDINGS

The following is a condensed statement in narrative form of those portions of the oral proceedings material to the determination of the points on appeal.

There were a total of three witnesses testifying on behalf of the People. These were Police Sargeant Huston Splawn, Police Sergeant Katharine Scholler and Police Officer Alexander.

Sargeant Splawn testified as follows: On April 26, 1968, he observed the Defendant in the Court House corridor outside of Division 20. Defendant was wearing a jacket (later introduced in evidence as People's Exhibit No. 1) bearing the words "Fuck the Draft". There were women and children present in the said corridor. Defendant then entered the Courtroom of Division 20, where Defendant removed his jacket and held it folded over his arm. Sargeant Splawn sent a message to Judge Fainer of Division 20, requesting that Judge Fainer hold the Defendant in contempt of Court. Judge Fainer sent

a reply message to Sargeant Splawn, refusing to hold the Defendant in contempt. When the Defendant emerged from the Courtroom into the Court House corridor, Sargeant Splawn placed the Defendant under arrest, and advised him as to his constitutional rights upon arrest.

Sargeant Scholler and Officer Alexander corroborated Sargeant Splawn's testimony as to Defendant's presence in the said corridor, his wearing of the said jacket, his entering the said Courtroom, and as to the presence in the said corridor of women and children. No evidence was offered by the People indicating or tending to indicate that Defendant either engaged in or threatened any acts of violence, or was about to engage in any such acts, or that Defendant by his conduct incited any one else to any acts of violence, or that any persons observing Defendant engaged in or threatened, or were about to engage in acts of violence. No evidence was offered by the People indicating or tending to indicate that Defendant at any time caused the emission of any loud or unusual noises.

Defendant testified as follows: He is nineteen years old and employed by Ohrbach's Department Store. He admitted wearing the said jacket in the said corridor. He denied that he had placed the words "Fuck the Draft" on the said jacket, but admitted that he was aware that such words were on the jacket at the time he wore it. Defendant explained that on the night of April 25, 1968, he met with a group of friends and acquaintances and that some of those present suggested the need to inform the public of their opposition to the Vietnam War, and to the draft. Immediately following such discussion, someone whom the Defendant could not identify placed the words "Fuck the Draft" on Defendant's jacket. Someone other than Defendant also placed the words "Stop War" on the said jacket, as well as a "peace symbol" consisting of a circle with a verticle line running through the circle and two diagonal lines meeting the verticle line in the lower portion of the circle. Defendant himself also placed a second such "peace symbol" on the jacket. Defendant testified that he wore the said jacket the following day, April 26th, because it was a chilly day and this was his only jacket. He further stated that by wearing the said

jacket the public was made aware of the depth of feeling against the draft shared by himself and his friends. He stated that in wearing the jacket he had no wish to vex, annoy or injure others, nor did he wear the jacket for the purpose of injuring anyone else.

During the course of the trial the Court made the following rulings:

1. The Court held that "tumultuous or offensive conduct", within the meaning of Penal Code § 415, may consist of written words unaccompanied by any actual or threatened violence.

2. The Court held that that portion of Section 415 proscribing the use of "vulgar, profane, or indecent language within the presence of women and children, in a loud and boistrous manner" may apply to the use of such language in a written rather than oral form.

3. The Court held that Defendant may be convicted for violation of that portion of Section 415 proscribing the use of "vulgar, profane, or indecent language within the presence of women and children, in a loud and boistrous manner" despite the fact that the complaint only charges violation of another portion of Section 415, i.e. "engaging in tumultuous and offensive conduct."

4. The Court denied Defendant's motion to suppress evidence on constitutional grounds, holding that a conviction under Section 415 for the mere display of the words "Fuck the Draft" unconnected with any actual or threatened violence does not constitute a violation of Defendant's rights under the First and Fourteenth Amendments of the U.S. Constitution, or of Article I, § 9, of the California Constitution.

5. The Court held, as a matter of law, that the words "Fuck the Draft" are "obscene" within the constitutional meaning of that word.

6. The Court denied Defendant's motion for entry of judgment of acquittal under Penal Code § 1118.

7. The Court held that under the evidence Defendant may be convicted of violation of Section 415 without abridging his rights under the First and

Fourteenth Amendments of the U.S. Constitution, or of Article I, § 9, of the California Constitution.

8. The Court held that Section 415 as construed by the Court is not unconstitutionally vague.

9. The Court held that Section 415 as construed by the Court is not unconstitutionally overbroad.

The Court found the Defendant guilty as charged, and sentenced him to thirty days in jail.

## II

## GROUNDS FOR APPEAL

The grounds upon which Appellant intends to rely upon appeal are as follows:

A. The Court erred in holding that "tumultuous or offensive conduct" within the meaning of Penal Code § 415 may consist of written words unaccompanied by any actual or threatened violence.

B. The Court erred in holding that that portion of Penal Code § 415 proscribing the use of "vulgar, profane, or indecent language within the presence of women and children, in a loud and boistrous manner" may apply to the use of such language in written rather than oral form.

C. The Court erred in holding that Defendant may be convicted for violation of that portion of Penal Code § 415 proscribing the use of "vulgar, profane, or indecent language within the presence of women and children in a loud and boistrous manner" when the complaint only charges violation of another portion of Section 415, i.e. "engaging in tumultuous and offensive conduct."

D. The Court erred in that the evidence was insufficient to establish any actual or threatned violence by Defendant.

E. The Court erred in that the evidence was insufficient to establish that Defendant acted "willfully and maliciously."

F. The Court erred in denying Defendant's motion to suppress evidence on constitutional grounds, in that under the First and Fourteenth Amendments of the U.S. Constitution and Article I, § 9, of the Cali-

fornia Constitution the exhibition of written words may not be punished absent a showing that the words are either "obscene" or that their exhibition creates a clear and present danger of serious violence.

G. The Court erred in holding, as a matter of law, that the words "Fuck the Draft" are "obscene" within the constitutional meaning of that word.

H. The Court erred in applying Penal Code § 415 under the facts in evidence, in that Section 415 as thus applied is in violation of the First and Fourteenth Amendments of the U.S. Constitution and of Article I, § 9, of the California Constitution.

I. The Court erred in applying Penal Code § 415, since as construed by the Court, Section 415 is unconstitutionally vague in violation of the Fourteenth Amendment of the U.S. Constitution.

J. The Court erred in applying Section 415, since as construed by the Court, Section 415 is unconstitutionally overbroad in violation of the First and Fourteenth Amendments of the U.S. Constitution.

Dated: October 5, 1968.

MELVILLE B. NIMMER
Attorney for Defendant-Appellant

The foregoing Settled Statement on Appeal consisting of 5 pages is now settled, allowed, certified and signed as the Statement on appeal herein.

DATED: Oct. 30, 1968

/s/ James Harvey Brown
Judge of the Municipal Court of
Los Angeles Judicial District

APPELLATE DEPARTMENT
OF THE SUPERIOR COURT
OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

Superior Court No. CR. A. 8258
Trial Court No. 310996

PEOPLE OF THE STATE OF CALIFORNIA,
PLAINTIFF AND RESPONDENT

*vs.*

PAUL ROBERT COHEN, DEFENDANT AND APPELLANT

ORDER CERTIFYING CAUSE TO COURT OF APPEAL—
June 5, 1969

Pursuant to Rule 63(a) and (c), California Rules of Court, and upon timely application by the respondent, we certify that transfer of the above-entitled cause to the Court of Appeal appears necessary to settle an important question of law.

The question so presented is:

> Does conduct which may be "offensive" but lacks any aspect of being "tumultuous" violate Penal Code Section 415 covering disturbances of the peace?

By our opinion, a copy of which is attached hereto, we concluded that the Legislature did not intend to punish as disturbing the peace, "offensive" conduct that was quiet and peaceful, but only that which was "tumultuous." Accordingly, we determined as a matter of statutory construction that said Penal Code section applies only to conduct which has some element of tumult actual or threatened and that the section should be construed as if it read:

> "Every person who maliciously and wilfully disturbs the peace or quiet of any neighborhood or per-

son by loud or unusual noise, or by tumultuous [and] offensive conduct," etc.

Dated Jun. 5, 1969

BY THE COURT

WHYTE
Presiding Judge

VASEY
Judge

WONG
Judge

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION TWO

2d Crim. No. 16702
Superior Court No. CR A 8258
Trial Court No. 310996

PEOPLE OF THE STATE OF CALIFORNIA,
PLAINTIFF AND RESPONDENT

*vs.*

PAUL ROBERT COHEN, DEFENDANT AND APPELLANT

THE COURT:

The appellate department of the Superior Court of Los Angeles County having certified that a transfer of the appeal in the above entitled action to the Court of Appeal appears necessary to settle important questions of law, and good cause appearing therefor, the appeal from the Municipal Court, Los Angeles Judicial District, County of Los Angeles, State of California, now pending in the appellate department of the Superior Court of the County of Los Angeles and numbered CR A 8258 therein, is hereby transferred to the Court of Appeal, Second Appellate District, Division Two. The appeal is calendared for oral argument before this court on July 15, 1969, at 9:30 a.m.

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION TWO

2d Crim. No. 16702

PEOPLE OF THE STATE OF CALIFORNIA,
PLAINTIFF AND RESPONDENT

*vs.*

PAUL ROBERT COHEN, DEFENDANT AND APPELLANT

OPINION OF THE COURT OF APPEAL—
Filed October 22, 1969

Certification from the Appellate Department of the Superior Court of Los Angeles County pursuant to Rule 63(a) and (c). Affirmed.

Melville B. Nimmer for Defendant and Appellant.

Roger Arnebergh, City Attorney, Michael T. Sauer, Deputy City Attorney for Plaintiff and Respondent.

Paul Robert Cohen was charged in a complaint filed in the Municipal Court with a violation of section 415 of the Penal Code. The complaint alleges that the defendant "did wilfully and unlawfully and maliciously disturb the peace and quiet of the neighborhood of 110 North Grand and the peace and quiet of this complainant and other persons then and there being present, by then and there engaging in tumultuous and offensive conduct." Trial by jury was waived. The defendant was found guilty, probation was denied and he was sentenced to 30 days in the county jail.

## FACTS

On April 26, 1968 the defendant was observed in the Los Angeles County Courthouse in the corridor outside of Division 20 of the Municipal Court wearing a jacket bearing the words "Fuck the Draft" which were plainly visible. There were women and children present in the corridor. The defendant was arrested. The defendant

testified that he wore the jacket knowing that the words were on the jacket as a means of informing the public of the depth of his feelings against the Vietnam War and the draft.

The defendant did not engage in, nor threaten to engage in, nor did anyone as the result of his conduct in fact commit or threaten to commit any act of violence. The defendant did not make any loud or unusual noise, nor was there any evidence that he uttered any sound prior to his arrest.

## QUESTION PRESENTED

Is offensive conduct which is not also tumultuous punishable under Penal Code section 415?[1]

Penal Code section 415 makes punishable a disturbance of the peace or quiet of a neighborhood by tumultuous *or* offensive conduct. If this statute is interpreted literally, any conduct which is tumultuous but not "offensive" is a crime and any conduct which is offensive but not "tumultuous" is a crime.

The appellant argues that he cannot be guilty of the crime of breach of the peace since his conduct consisted of the use of words unaccompanied by violence or the threat of violence.

It is the appellant's contention that the offense of disturbance of the peace does not exist without actual or

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[1] Penal Code section 415 provides as follows: "Every person who maliciously and willfully disturbs the peace or quiet of any neighborhood or person, by loud or unusual noise, or by tumultuous or offensive conduct, or threatening, traducing, quarreling, challenging to fight, or fighting, or who, on the public streets of any unincorporated town, or upon the public highways in such unincorporated town, run any horse-race, either for a wager or for amusement, or fire any gun or pistol in such unincorporated town, or use any vulgar, profane, or indecent language within the presence or hearing of women or children, in a loud and boisterous manner, is guilty of a misdemeanor, and upon conviction by any court of competent jurisdiction shall be punished by fine not exceeding two hundred dollars, or by imprisonment in the county jail for not more than ninety days, or by both fine and imprisonment, or either, at the discretion of the court."

threatened violence or behavior which is *likely* to create a disturbance. We agree with this statement of the law. However, we reach a different conclusion in applying the law to the facts.

Breach of the peace and disturbing the peace are synonymous terms. Section 415 when enacted in 1872 was a codification of the existing common law crime of breach of the peace. Therefore, in resolving the novel question presented us we can look to the common law to assist us in assaying the legislative intent behind the use of the words "offensive conduct".

In *Cantwell* v. *Connecticut*, 310 U.S. 296 at page 308 the United States Supreme Court stated the common law succinctly "The offense known as breach of the peace embraces a great variety of conduct destroying or *menacing* public order and tranquility. It includes not only violent acts but acts and words *likely* to produce violence in others." (Emphasis added.)

The Restatement, Second, Torts, section 116 contains this definition of the crime of breach of the peace: "A breach of the peace is a public offense done by violence, or likely to cause an immediate disturbance of public order."

In California our appellate courts have evolved the same definition for the crime of disturbing the peace.

Any act or conduct which disturbs the peace and quiet by inciting violence or which tends to provoke others to break the peace constitutes disturbance of the peace (*People* v. *Anderson*, 17 Cal.App. Supp. 763, 767; 9 Cal. Jur.2d §§ 17-18). "It is not necessary that any act have in itself any element of violence in order to constitute a breach of the peace." (*People* v. *Green*, 234 Cal. App. 2d Supp. 871, 873.)

We conclude from the foregoing authorities that if it can be reasonably anticipated that certain conduct will cause others to disturb the peace, wilfully and maliciously engaging in such behavior constitutes a disturbance of the peace.

Thus, under section 415 a person who engages in offensive behavior which has a tendency to provoke *others* to acts of violence or to in turn disturb the peace and

quiet is guilty of disturbing the peace although his own conduct, while offensive, was not in itself violent.

In the matter before us the defendant deliberately wore a jacket emblazoned with language which is clearly offensive and below the "minimum standard of propriety and the accepted norm of public behavior" (*Goldberg* v. *The Regents of the University of California*, 248 Cal. App.2d 867, 880) at least when paraded through a courthouse corridor containing women and children. The defendant's conduct consisted of more than a quiet and peaceful assertion of his convictions about the draft. He carefully chose the forum for his views where his conduct would have an effective shock impact. The defendant's stated purpose was to force a confrontation with others as to his opinion of the draft. The expression he chose to display on his jacket is one which is not used publicly to espouse a philosophy or a personal conviction. He was intent upon attracting the attention of others to his views by the sheer vulgarity of his expression. He must have been aware that his behavior would vex and annoy a substantial portion of his unwilling "audience". His conduct was, therefore, malicious under Penal Code section 7.[2]

It was certainly reasonably foreseeable that such conduct might cause others to rise up to commit a violent act against the person of the defendant or attempt to forceably remove his jacket. The fact that the police intervened and that the defendant was arrested before violence occurred does not make his conduct any the less provocative. We think it also a reasonable inference from the time and place of defendant's act that he intended to provoke disorder.

It is our conclusion that the defendant's acts constituted the type of offensive conduct prohibited by section 415 in that it had a tendency to incite others to violent behavior or to disturb the peace.

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[2] Penal Code section 7 provides in part as follows: ". . . The words 'malice' and 'maliciously' import a wish to vex, annoy, or injure another person, or an intent to do a wrongful act, established either by proof or presumption of law; . . ."

It is also our view that it is not a valid defense to a charge of disturbing the peace that the defendant's conduct was not violent or tumultuous if it was foreseeable that his acts would tend to cause others to commit violent acts or disturb the peace.

The court's minutes reflect that the defendant was found guilty as charged. The complaint charged him with engaging in tumultuous *and* offensive conduct. There was no evidence that the defendant engaged in "tumultuous" conduct. Penal Code section 415 sets forth a series of acts in the disjunctive. When an accusatory pleading sets forth more than one act prohibited by section 415 in the conjunctive, evidence which is sufficient to support a finding of guilt of any one of the acts denounced by the statute is sufficient for a conviction although the evidence does not support a conviction for each of the acts set out in the complaint (*People* v. *McClennegen*, 195 Cal. 445, 452).

The appellant also contends that the term "offensive" is unconstitutionally vague and overbroad." We disagree. In *People* v. *Green*, 234 Cal.App.2d Supp. 871, 875 cert. denied, 382 U.S. 993, Penal Code section 415 was held to be "not unconstitutionally vague or indefinite." We feel the language relied upon by the California Supreme Court in [a] *People* v. *Daniels, et al.* (October 2, 1969) —— Cal.2d ——, —— is particularly applicable as a standard in construing the constitutional scope of the term "offensive" as used in section 415. "In reaching this conclusion we invoked the settled rule of statutory interpretation that " 'All laws should receive a sensible construction. General terms should be so limited in their application as to not lead to injustice, oppression, or an absurd consequence. *It will always, therefore, be presumed that the Legislature intended exceptions to its language, which would avoid results of this character. The reason of the law in such cases should prevail over the letter.*' " (*United States* v. *Kirby* [1868] 74 U.S. [7 Wall] 482, 486-487 accord; *People* v. *Oliver* [1961] 55 Cal.2d 761, 767, and cases cited.) (Emphasis added.)

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[a] Advance Report Citation: ..... A.C. .....

The words "offensive conduct" have stood the test of time and have a commonly accepted meaning. The term "offensive" has a well established meaning when used in connection with words which can cause a breach of the peace. In *Chaplinsky* v. *New Hampshire*, 315 U.S. 568, 571-572, the United States Supreme Court quoted with approval the following language from the opinion of the Supreme Court of New Hampshire in *State* v. *Chaplinsky*, 91 N. H. 310, 18 A. 2d 754: "The word 'offensive' is not to be defined in terms of what a particular addressee thinks. . . . The test is what men of common intelligence would understand would be words likely to cause an average addressee to fight. . . . The English language has a number of words and expressions which by general consent are 'fighting words' when said without a disarming smile. . . . Such words, as ordinary men know, are likely to cause a fight. So are threatening, profane or obscene revilings. Derisive and annoying words can be taken as coming within the purview of the statute as heretofore interpreted only when they have this characteristic of plainly tending to excite the addressee to a breach of the peace. . . . The statute, as construed, does no more than prohibit the face-to-face words plainly likely to cause a breach of the peace by the addressee, words whose speaking constitute a breach of the peace by the speaker—including 'classical fighting words,' words in current use less 'classical' but equally likely to cause violence, and other disorderly words, including profanity, obscenity and threats."

As modified by case law the only "offensive" conduct prohibited by section 415 is that which incites violence or has a tendency to incite others to violence or a breach of the peace. (Cf. *People* v. *Davis*, 68 Cal.2d 481, 486-487.) This standard makes clear for triers of fact the nature of the forbidden conduct, and eliminates prosecutions or convictions for conduct which is merely offensive.

The appellant argues that Penal Code section 415 if interpreted to prohibit the behavior which led to his arrest and conviction violates his right to freedom of speech as guaranteed by the First Amendment.

In analyzing this constitutional attack we can look to the guidelines set forth in opinions of the United States Supreme Court involving the conflict created by the coexistence of the right of freedom of speech and the crime of disturbance of the peace where the alleged disturbance involves the use of language.

Freedom of speech is not absolute. It must be balanced against other public interests (*American Communications Assn.* v. *Douds*, 339 U.S. 382, 399; *Bread* v. *Alexandria*, 341 U.S. 622, 642). ". . . when 'speech' and 'non-speech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the non-speech element can justify incidental limitations on First Amendment freedoms." (*United States* v. *O'Brien*, 391 U.S. 367, 376; 20 L.Ed.2d 672, 680.)

The First Amendment does not afford any protection to one who uses language which tends to incite violence or a disturbance of the peace by others. "There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words—those which by their very utterance inflict injury or tend to incite to an immediate breach of the peace. It has been well observed that such utterances are no essential part of any such exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality. 'Resort to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution, and its punishment as a criminal act would raise no question under that instrument.' *Cantwell* v. *Connecticut*, 310 U.S. 296, 309-310." (*Beauharnais* v. *Illinois*, 343 U.S. 250, 255; *Chaplinsky* v. *New Hampshire*, 315 U.S. 568, 571-572.)

The right to freedom of speech does not protect illegal conduct merely because it is in part initiated, evidenced, or carried out by means of language either spoken, written, or printed. (*Giboney* v. *Empire Storage and Ice Co.*,

336 U.S. 490, 502; 93 L.Ed. 834, 843; *Cox* v. *Louisiana*, 379 U.S. 559, 563; 13 L.Ed.2d 487, 492-493; *People* v. *Davis*, 68 Cal.2d 481, 486.)

"When protest takes the form of mass demonstration, parades; or picketing on public streets and sidewalks . . . the free passage of traffic and *the prevention of public disorder and violence* become important objects of legitimate state concern. As the court stated in *Cox* v. *Louisiana*, 'We emphatically reject the notion . . . that the First and Fourteenth Amendments afford the same freedom to those who would communicate ideas by conduct such as patroling, marching, and picketing on streets and highways, as these amendments afford to those who communicate ideas by pure speech, 379 U.S. 535, 555; 13 L.Ed.2d 471, 484; 85 S.Ct. 453.'" (Emphasis added.) (*Walker* v. *Birmingham*, 388 U.S. 307, 316.)

"One may . . . be guilty of the offense [of breach of the peace] if he commits acts or makes statements likely to provoke violence or disturbance of good order, even though no such eventuality be intended." (*Cantwell* v. *Connecticut*, 310 U.S. 296, 396; 84 L.Ed. 1213, 1221.)

In the case before us, the defendant's conduct consisted of "speech" and "non-speech" elements. Here the non-speech element of defendant's conduct consisted of marching through a public building with the premeditated intent of attracting the attention of others to the message on his jacket.

The gravaman of the defendant's offense was his selection of the public corridors of the county courthouse as the place to parade before women and children who were involuntarily subjected to unprintable language. The expression used by the defendant to propagate his views is one of the most notorious four-letter words in the English language. Despite its ancient origins, it has yet to gain sufficient acceptance to appear in any standard dictionary (cf. Webster's Third New International Dictionary; The Oxford Dictionary of American English; The Oxford English Dictionary). In the work "A Dictionary of Slang and Unconventional English" by Eric Partridge, the word is defined; however, the second letter has been replaced with an asterisk.

The defendant has not been subjected to prosecution for expressing his political views. His right to speak out against the draft and war is protected by the First Amendment. However, no one has the right to express his views by means of printing lewd and vulgar language which is likely to cause others to breach the peace to protect women and children from such exposure.

It is our view, based on our interpretation of the decisions of the United States Supreme Court that the defendant's conduct in this case went beyond the permissive ambit of the First Amendment's protection as circumscribed in the *Cantwell, supra, Chaplinsky, supra,* and *Beauharnais, supra,* cases.

The trial judge ruled that although the complaint charged the defendant with disturbing the peace by means of tumultuous and offensive conduct, the defendant could be found guilty of the use of "vulgar, profane, or indecent language within the presence of or hearing of women or children in a loud boisterous manner" conduct also prohibited by section 415 of the Penal Code. This ruling was incorrect. Proof that the language was uttered in a "loud and boisterous" manner is "a very necessary matter to complete the offense" of disturbing the peace by the use of vulgar, profane and indecent language in the presence or hearing of women and children (*Ex parte Bognton,* 1 Cal. App. 294). In the present case there was no proof that the defendant engaged in any loud or boisterous conduct. Furthermore, a person cannot be found guilty of a crime of which he was not charged. "Conviction upon a charge not made would be sheer denial of due process." (*DeJorge* v. *Oregon,* 299 U.S. 353, 362.)

We have found that the evidence was sufficient to support a conviction for disturbing the peace by means of offensive conduct as prohibited by section 415 of the Penal Code. A decision which is right in result will not be reversed on appeal although the reason stated is wrong. (*People* v. *Evans,* 249 Cal.App.2d 254, 257; *People* v. *Selz,* 138 Cal.App.2d 205, 210.)

In a court trial, the trial judge's erroneous opinion on the law is not grounds for a reversal. (*People* v.

*Wolfe*, 257 Cal.App.2d 420, 426.) We have examined each of the points raised by the defendant without finding reversible error. The judgment is affirmed.

Alarcon, *J. pro tem.**

We concur:

Roth, *P. J.*
Fleming, *J.*

* Assigned by Chairman of the Judicial Council.

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION TWO

Crim. No. 16702

PEOPLE

*v.*

COHEN

MINUTES OF NOVEMBER 13, 1969

The Court: Petition for rehearing denied.

Order Due December 19, 1969

ORDER DENYING HEARING AFTER JUDGMENT
BY THE COURT OF APPEAL

2nd District, Division 2, Crim. No. 16702

ALARCON, J. P. T.
R & F

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA
IN BANK

[Filed Dec. 17, 1969, William I. Sullivan, Clerk.]

PEOPLE

*v.*

COHEN

Appellant's petition for hearing DENIED.
Traynor, C.J., Peters, J., and Tobriner, J., are of the opinion that the petition should be granted.

TRAYNOR
Chief Justice

SUPREME COURT OF THE UNITED STATES

No. 1809 Misc., October Term, 1969

PAUL ROBERT COHEN, APPELLANT

*v.*

CALIFORNIA

ON CONSIDERATION of the motion for leave to proceed in forma pauperis herein,

IT IS ORDERED by this Court that the said motion be, and the same is hereby, granted.

June 22, 1970

SUPREME COURT OF THE UNITED STATES

No. 1809 Misc., October Term, 1969

PAUL ROBERT COHEN, APPELLANT

*v.*

CALIFORNIA

APPEAL from the Court of Appeal of the State of California, Second Appellate District.

The statement of jurisdiction in this case having been submitted and considered by the Court, further consideration of the question of jurisdiction is postponed to the hearing of the case of the merits. The case is transferred to the appellate docket as No. 1731 and placed on the summary calendar.

June 22, 1970

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# In the Supreme Court
OF THE
# United States

OCTOBER TERM, 1970

## No. 299

PAUL ROBERT COHEN, *Appellant*

vs.

THE STATE OF CALIFORNIA, *Appellee*

On Appeal from the Court of Appeal,
Second Appellate District, State of California

## MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE
and
## BRIEF AMICUS CURIAE ON BEHALF OF THE AMERICAN CIVIL LIBERTIES UNION OF NORTHERN CALIFORNIA

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# In the Supreme Court
OF THE
# United States

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OCTOBER TERM, 1970

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No. 299

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PAUL ROBERT COHEN,
*Appellant,*

vs.

THE STATE OF CALIFORNIA,
*Appellee.*

---

**On Appeal from the Court of Appeal,
Second Appellate District, State of California**

## MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE
## and
## BRIEF AMICUS CURIAE ON BEHALF OF THE AMERICAN CIVIL LIBERTIES UNION OF NORTHERN CALIFORNIA

## MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

For half a century, the American Civil Liberties Union has had a single interest: defense of the freedoms guaranteed to the people by the Constitution. Preeminent among those freedoms is the right of free speech protected by the First and Fourteenth Amendments, "the very foundation of constitutional government."[1] Because the principles upon which appellant Cohen's conviction rests are inimical and full of danger to those of the First and Fourteenth Amendments, we thus respectfully move for leave to file this brief *amicus curiae,* urging reversal. The consent of the attorney for appellee has been obtained and his letter of consent has been deposited with the clerk. The consent of the attorney for appellant was requested but refused.

Respectfully submitted,

PAUL N. HALVONIK,
CHARLES C. MARSON,
ANTHONY G. AMSTERDAM,
*Attorneys for the American Civil Liberties Union of Northern California.*

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[1] *DeJonge v. Oregon,* 299 U.S. 353, 365 (1937):

"The greater the importance of safeguarding the community from incitements to the overthrow of our institutions by force and violence, the more imperative is the need to preserve inviolate the constitutional rights of free speech, free press and free assembly in order to maintain the opportunity for free political discussion, to the end that government may be responsive to the will of the people and that changes, if desired, may be obtained by peaceful means. Therein lies the security of the Republic, the very foundation of constitutional government."

## BRIEF AMICUS CURIAE

### I. INTRODUCTION

In this case, the Court is once again required to review the conviction of a political dissident under a criminal statute punishing breach of the peace. Like the Court, the American Civil Liberties Union has had long experience with these breach-of-the-peace laws. They are the sinks of American criminal and constitutional jurisprudence. Hundreds of times every day, in every State, their applications are the occasions of arbitrariness and injustice, harassment, ideological repression. In unparalleled fashion and degree, they are the chosen instruments for making law a nuisance to all those persons whom an officer of the law or a magistrate happens to regard as nuisances. They give color of law to ultimate lawlessness, to a state in which "lawmaking is . . . entrusted to the moment-to-moment judgment of the policeman on his beat,"[2] and "a person may stand on a public sidewalk . . . only at the whim of any police officer. . . ."[3]

Of course, the prosperous, white, well-groomed, well-shod citizen, so long as he avoids political assemblies and never expresses unpopular views in public, has no reason to encounter these laws, or even to know that more arrests are made yearly under their authority than for any other "crime" except drunk-

[2]Mr. Justice Black, concurring, in *Gregory v. City of Chicago*, 394 U.S. 111, 120 (1969).

[3]*Shuttlesworth v. City of Birmingham*, 382 U.S. 87, 90 (1965).

enness.[4] But where the poor live, or the black, the dissentient, culturally divergent, those whom policemen see as "subjects" rather than objects—or any whom youth, venturesomeness, wanderlust, social or political activism or bad housing cause to be upon the streets more than ordinarily often—the breach-of-the-peace laws are an ever-present, repressive force. They are the means by which authority (meaning the police and police-court judges) make "those people" toe the line.

This Court has seen a meager sampling of the consequences in a few dozen cases during thirty years. It has reversed breach-of-the-peace convictions of unpopular religious evangelists, unpopular political orators, unpopular protesters, Freedom Riders, sit-inners, street-marchers, black boys in a "white" park,[5] and, once, a black man having the temerity to argue with an officer who had arrested him for doing nothing illegal while waiting for a bus.[6] These cases are the barely perceptible tip of a tremendous iceberg. For every breach-of-the-peace conviction that

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[4] PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE COURTS (1967), 102. This statement relates generally to what the Task Force calls "disorderly conduct" laws—including breach-of-the peace and cognate statutes. See note 7, *infra*.

[5] *Cantwell v. Connecticut*, 310 U.S. 296 (1940); *Terminiello v. City of Chicago*, 337 U.S. 1 (1949); *Garner v. Louisiana*, 368 U.S. 157 (1961); *Taylor v. Louisiana*, 370 U.S. 154 (1962); *Edwards v. South Carolina*, 372 U.S. 229 (1963); *Wright v. Georgia*, 373 U.S. 284 (1963); *Fields v. South Carolina*, 375 U.S. 44 (1963); *Henry v. City of Rock Hill*, 376 U.S. 776 (1964); *Cox v. Louisiana*, 379 U.S. 536 (1965); *Thomas v. Mississippi*, 380 U.S. 524 (1965); *Brown v. Louisiana*, 383 U.S. 131 (1966); *Bachellar v. Maryland*, 397 U.S. 564 (1970).

[6] *Thompson v. City of Louisville*, 362 U.S. 199 (1960).

this Court has upset, there are literally tens of thousands of equally abusive and unconstitutional uses of the breach-of-the-peace statutes that the Court will never see.

For the most part, the statutes are enforced by summary police action: orders to "move along," arrests (later dropped, or escalated into more serious charges, such as resisting arrest), or the truncheon. These cases do not come to court at all. When breach-of-the-peace cases do come to court, the defendants are poor, the penalties small, appeal costs relatively large, and lawyers largely unavailable. So the cases terminate in the police court, and frequently in uncorrectible injustice.

This is not merely an A.C.L.U. view. The relevant Task Force of the National Crime Commission reached virtually identical conclusions. It found:[7]

> "These laws tend to embrace an excessively broad range of conduct, some of it dangerous, some merely annoying, some harmless, some constitutionally protected. While these statutes protect important interests, they often are excessively general and do not adequately discriminate and identify the kinds of behavior legitimately to be prohibited. . . .
>
> "These excessively broad laws are applied in excessively broad ways that lead to convictions

[7] *Op. cit. supra*, note 4, at 102-104. In the first two quoted paragraphs, the Task Force is speaking of "disorderly conduct" laws, a category composed principally of breach-of-the-peace statutes but also including similarly open-ended statutes punishing loitering, unlawful assembly and riot. In the third and fourth paragraphs, the Task Force speaks of all these laws and also of vagrancy laws.

for some conduct that properly is subject to criminal control and to convictions for some conduct that is harmless or should be protected. Some of these convictions are reversed, but not the overwhelming majority. There is little appellate review of the work of the often ill-trained magistrates who work with these vague laws. A New York study revealed that although over 70,000 disorderly conduct arraignments occurred in 1957 alone, there have been only approximately 150 reported opinions since the enactment of the statute in 1923.

. . . . . .

"Precisely because [these] . . . charges are so commonly relied upon by law enforcement authorities, as well as because penalties involved are generally minor, and defendants are usually from the lowest economic and social levels, they have proved largely resistant to scrutiny and change. Yet

> this is a most important area of criminal administration, affecting the largest number of defendants, involving a great portion of police activity, and powerfully influencing the view of public justice held by millions of people.

. . . . . .

"Improvements in laws such as these are of great importance. The high price paid for extending to the police wide and largely uncontrollable power . . . should be recognized. Foremost among its disadvantages is that it constitutes an abandonment of the basic principle upon which the whole system of criminal justice in a democratic community rests, close control over exercise of the authority delegated to officials to employ force and coercion. This control is to be found in care-

> fully defined laws and in judicial and administrative accountability. The looseness of the laws constitutes a charter of authority on the street whenever the police deem it desirable. The practical costs of this departure from principle are significant. One of its consequences is to communicate to the people who tend to be the object of these laws the idea that law enforcement is not a regularized, authoritative procedure, but largely a matter of arbitrary behavior by the authorities. The application of these laws often tends to discriminate against the poor and subcultural groups in the population. . . . And it is costly for society when the law arouses the feelings associated with these laws in the ghetto, a sense of persecution and helplessness before official power and hostility to police and other authority that may tend to generate the very conditions of criminality society is seeking to extirpate."

The broad-scale pernicious effects of these breach-of-the-peace laws have survived untouched by a dozen decisions of this Court reversing convictions under them in a dozen years.[8] Each decision has been narrow, turning upon the circumstances of particular arrests or trials, and leaving the basic structure of the laws unaffected. The same "excessively broad" character of the statutes that renders them inherently dangerous to civil liberties also makes it inevitable that most of the breach-of-the-peace charges which reach the Court will prove factually baseless or improperly administered in the trial proceedings, entail-

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[8]See notes 5, 6 *supra*.

ing reversal upon grounds that permit the laws to continue to exist and to be applied in countless other cases identical in all respects except that they are not appealed. So, if we could properly do so, we would urge the Court to make the present case the occasion of a broad constitutional decision, condemning California's version of the breach-of-the-peace concept, Penal Code §415.

We feel that we cannot properly do so, in view of the narrower grounds upon which reversal is here, as usual, required. For we recognize that there are complicating features about this problem of the constitutionality of breach-of-the peace laws. The very universality of the laws and the frequency of their employment reinforce the wisdom, in this context, of the Court's ordinary canon of constitutional adjudication, "not to entertain constitutional questions in advance of the strictest necessity."[9] Doubtless, that consideration has informed the Court's narrow dispositions of previous breach-of-the-peace cases brought here in recent years. However much we may deplore the seemingly ubiquitous abuses of the breach-of-the-peace laws and what appears to us their endemic susceptibility to abuse, we cannot deny a solid core of legitimate state interest in the maintenance of *some* form of "laws to protect the public from . . . boisterous and threatening conduct that disturbs the tranquility of spots selected by the people either for homes . . . or for public and other buildings that require peace and quiet to carry out their functions.

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[9] *Parker v. County of Los Angeles*, 338 U.S. 327, 333 (1949).

. . ."[10] Therein lies the "dilemma" identified by Mr. Justice Black in his concurring opinion in *Gregory* v. *City of Chicago*:[11] the troublesome problem of accommodating such laws protecting public tranquility with the vital public interest in preserving free speech, all the more indispensable to public security[12] *because* speech "may . . . best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger."[13] With interests of such magnitude in the balance, long-standing traditions of the Court call upon it to "resist the pulls to decide the constitutional issues involved in this case on a broader basis than the record . . . imperatively requires."[14]

Accordingly, we shall urge reversal upon narrow grounds. However, with utmost deference, we think it important to emphasize that the policy against premature and unnecessary constitutional decision cuts two ways. Particularly in connection with a concept such as breach of the peace, whose inherent dangers to precious civil liberties have again and again materialized in demonstrated instances of violations of those liberties,[15] premature constitutional validation is to be avoided equally with premature constitutional inval-

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[10]Mr. Justice Black, concurring, in *Gregory v. City of Chicago*, 394 U.S. 111, 118 (1969).

[11]*Ibid.*

[12]See note 1, *supra*.

[13]*Terminiello v. City of Chicago*, 337 U.S. 1, 4 (1949), approved in, e.g., *Edwards v. South Carolina*, 372 U.S. 229, 237 (1963).

[14]*Street v. New York*, 394 U.S. 576, 581 (1969).

[15]See, e.g., notes 5, 6 *supra*. And see the passage quoted at note 7, *supra*.

idation. Frankly, we are worried lest, in disposing of the present case on narrow grounds, the Court should gloss over the more basic questions presented by laws such as California Penal Code §415, and thus inadvertently appear to approve such laws. We urgently hope that it will not do so. For this reason, in the following sections of this brief (Part II), we identify large constitutional issues that we believe are *not* necessarily presented here, and which we hope that the Court will make plain it is *not* deciding. In the final sections (Part III), we state the narrower constitutional bases for reversal.

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## II. THE MAJOR CONSTITUTIONAL ISSUES WHOSE DECISION IS UNNECESSARY

### A. The Profanity Issue.

As we see it, this case does not present the question whether, consistently with the First and Fourteenth Amendments, a State may punish the utterance of a class of non-obscene "profane" speech. That is a question of considerable importance, fraught with the gravest difficulties. On the one hand, prohibitions of profanity have a long history in Anglo-American law and are widespread in this country. This Court has occasionally assumed their constitutionality.[16]

On the other hand, history makes plain that their origins lie in religious concerns that American governments may not constitutionally promote; and even today, the major interests that they serve are preven-

[16] E.g., *Beauharnais v. Illinois*, 343 U.S. 250, 256 (1952).

tion of moral affront and supposed prevention of moral corruption. Laws against obscenity may have some tenuous link to prevention of socially injurious *conduct*; laws against profanity appear, at least, to have none. Reconciliation of such laws with the First Amendment, particularly in cases where profanity is used to embody an idea that is indisputably one of political protest, therefore poses fundamentally troubling issues.

But two practical problems involved in the punishment of profanity make the question of its constitutionality yet more vexing. First, any crime which is constituted entirely by words—perhaps by a single word—creates inordinate possibilities of overreaching and abuse. One need not suppose that policemen are more frequently perjurious than other men to realize that, like other men, they may hear what they want to hear in the course of an excited conversation. The crime of profanity therefore makes oral controversy with the authorities exceedingly dangerous, and may operate forcefully to chill legitimate expressions of grievances by citizens.

Second, different subcultural groups in the American population have vastly differing linguistic conventions. Words that would clearly be perceived by some as "profane" are customary locutions for others.[17] The inherently arbitrary and discriminatory con-

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[17]The following excerpt of the reporter's transcript of a trial in Oakland, California, makes the point. The witness is a police officer who is on trial for physically and verbally abusing a group of youths:

sequences of a law punishing profanity in a culturally diverse community cannot be ignored.

For all of these reasons, we respectfully submit, the Court should not undertake to determine the constitutional status of "profanity" unless and until that question is squarely posed by some case which requires its decision. This case does not. For, although appellant Cohen's phrase "Fuck the Draft" may well appear to be a classic type of non-obscene[18] profanity, California has not sought to punish it as such. Rather, appellant has been convicted under a statute which, as authoritatively construed, punishes only one who "wilfully and maliciously incites others to *violence* or engages in conduct likely to incite others to *violence*." *In re Bushman*, 1 Cal.3d 767, 773, 463 P.2d 727, 730, 83 Cal.Rptr. 375, 378 (1970) (emphasis added). California Penal Code §415 is not a profanity statute, but a breach-of-the-peace statute; and appellant's conviction for its violation rests exclusively on

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"Q. Do you recall telling the driver of this automobile that if he didn't move the car you were going to break his windshield with your club?

"A. No. No, sir, I didn't tell him.

"Q. At no time?

"A. I told all them mother fuckers I didn't want no trouble, I didn't want no fight. I just told all them mother fuckers——

"Q. Now, did you curse them?

"A. No, sir.

"Q. Not at all?

"A. No."

[18]Notwithstanding the trial court's finding that "Fuck the Draft" is "'obscene' within the constitutional meaning of that word" (A. 20), it plainly is not. Whatever else may be unclear about obscenity, obscenity has something to do with prurient interest. And even Ovid, master of erotic personification, could not have made copulation with The Selective Service pruriently interesting.

the theory that "if it can be reasonably anticipated that certain conduct will cause others to disturb the peace, wilfully and maliciously engaging in such behavior constitutes a disturbance of the peace." (A. 28.)

Since California has not chosen to punish appellant for profanity, its constitutional power to do so is not in issue here. The only issues presented relate to whether California may constitutionally assert the specific power that it has in fact asserted, to punish the specific aspect of appellant's conduct upon which the assertion of that power has been exclusively based. In similar situations, this Court has many times reversed criminal convictions upon charges found to be constitutionally impermissible, while pretermitting decision of the question whether, on the facts of record, the defendants might constitutionally have been convicted of some other offense. E.g., *Garner* v. *Louisiana*, 368 U.S. 157, 164 (1961); *Edwards* v. *South Carolina*, 372 U.S. 229, 236 n. 11 (1963); *Shuttlesworth* v. *City of Birmingham*, 382 U.S. 87, 91-92 (1965); *Gregory* v. *City of Chicago*, 394 U.S. 111, 112 (1969); *Street* v. *New York*, 394 U.S. 576, 580-581 (1969); *Bachellar* v. *Maryland*, 397 U.S. 564, 569-571 (1970). Where, as here, the constitutionality of that other offense presents large, novel and difficult First Amendment questions, the same course should obviously be pursued.

In making this point, we do not ignore the argument which runs: "Profanity is not constitutionally protected speech; and, if it is not constitutionally pro-

tected speech, and if appellant used profanity, then he may not invoke the First Amendment to protect him against conviction for the profane words that he uttered, *whatever* may be California's asserted basis for punishing them."[19] This argument is simply wrong. For, even if it be true that the First Amendment does not forbid a State to punish profanity as such—if, in this sense, "profanity is not constitutionally protected speech"—it does not follow that the utterer of a profane word thereby becomes a First Amendment excommunicate, deprived of all protections of the Amendment. No more than "libel" or "obscenity" or other "mere labels,"[20] can "profanity" be given this sort of "talismanic immunity from constitutional limitations."[21] Assuming even that "damn" were profane, and profanity constitutionally punishable, it remains inconceivable, we think, that the First Amendment would permit a speaker who said "damn the Government" to be convicted of *sedition*.

The real issue, of course, is not whether "Fuck the Draft" should be labeled "profanity", but whether it can be "labeled 'speech' " for First Amendment purposes. See *United States* v. *O'Brien*, 391 U.S. 367, 376 (1968). Profane or not, it plainly is speech: the expression of a politically dissident view. So it is entitled to First Amendment protection against crim-

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[19]This reasoning may have been employed by the trial court, which expressly found that appellant's conduct was "obscene." See note 18, *supra*. Since obscenity was not an element of the offense charged, this finding was presumably thought relevant to rejection of appellant's First Amendment defenses.

[20]*New York Times Co. v. Sullivan*, 376 U.S. 254, 269 (1964).

[21]*Ibid.*

inal charges that are inconsistent with the freedom of speech which the First Amendment guarantees (see Sections III (A), (B), *infra*), whether or not the unmade charge of profanity would be one of them. The latter question, we repeat, is not presented here.

**B. The Scope of the Limitations Placed by the First Amendment Upon the Crime of Breach of the Peace.**

Nor does this case properly require decision concerning the outermost limits of permissible punishment of "breach of the peace" that are consistent with the First Amendment—the question, in other words, of the exact circumstances, if any, under which a State can constitutionally punish speech upon the basis of its tendency to incite or arouse violence.

The exquisite difficulty and complexity of that question should be obvious. Speech (or non-violent expressive conduct) may tend to lead to violence in either of two basic situations or some combination of them: where it incites persons sympathetic to the speaker to act violently in furtherance of his message; or where it arouses persons hostile to the speaker to react violently against the message. Perhaps the two situations are constitutionally equivalent; but perhaps, also, they ought not to be.

In both basic situations, there are several other parameters that may be given constitutional significance. *First*, the tendency of a speech to create violent reaction (pro or con) may be attributable more or less to the speaker's ideas themselves, or to the form of their expression (which may be more or less necessary to its effectiveness), or to the speaker's

person, or to some "signal" aspect of his speech, or of his person, or of the situation. *Second*, that tendency may be more or less strong; and its strength may be measured in differing ways: by *how likely* it is to incite to violence; by *how immediately* it is likely to incite to violence; by *whom* it is likely to incite to violence (the "average" man or the excitable; hypothetical men or those actually present; men fired by zeal for constitutional ideals, or those who would as like as not bust an uppity black or a shaggy youth in the nose). *Third*, the violence itself may be more or less serious; and it may be more or less preventible by police action directed against the violent persons as distinguished from the speaker. *Fourth*, the violence may be more or less foreseeable by the speaker; and it may be desired and intended by him, or it may be profoundly undesired—a risk reluctantly incurred as the price of his peaceful speaking-out.

We believe that proper First Amendment standards regulating the punishment of speech on grounds of its tendency to lead to violence must take account of all these dimensions. At the least, in the situation where the violence feared is that of hostile hearers, we think that speech cannot constitutionally be punished unless: (1) something in the form or circumstances of the speech, not integral to communication of the thought that the speech expresses, (2) creates a clear and present danger of imminent substantial violence (3) that cannot be controlled by police action aimed at the sources of violence rather than at the speaker; and unless (4) the speaker actually intends to pro-

voke violence, and (5) uses words or actions clearly of the sort that would provoke violence in an ordinary, law-abiding man.

While we think that each of these standards is supported by decisions of this Court,[22] and that all

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[22]The first standard limits punishment to cases in which the manner, not the ideological content, of speech is provoking. For, "'[i]t is firmly settled that under our Constitution the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers,' *Street v. New York*, 394 U.S. 576, 592 (1969), . . . or simply because bystanders object to peaceful and orderly demonstrations." *Bachellar v. Maryland*, 397 U.S. 564, 567 (1970).

The second standard requires clear and present danger of imminent, substantial violence. The "clear and present danger" test is the one consistently approved by this Court in various situations where criminal liability is sought to be attached to speech upon the sole ground that the speech may lead to harmful non-speech consequences. E.g. *Wood v. Georgia*, 370 U.S. 375, 384-385 (1962); *New York Times Co. v. Sullivan*, 376 U.S. 254, 272-273 (1964). Use of the test in this class of offenses, to measure the requisite relationship between speech and the feared harmful consequence, was recognized even in Chief Justice Vinson's opinion in *Dennis v. United States*, 341 U.S. 494, 503-511 (1951). And the "clear and present danger" formulation was expressly applied to describe the permissible boundaries of punishment of speech as a breach of the peace in *Cantwell v. Connecticut*, 310 U.S. 296, 308 (1940).

That the harmful consequence must also be "imminent" is clear. See *Garner v. Louisiana*, 368 U.S. 157, 169 (1961); cf. *Herndon v. Lowry*, 301 U.S. 242, 258-261 (1937); and compare *Yates v. United States*, 354 U.S. 298, 318-327 (1957). We think that it likewise must be substantial, for not every minor public inconvenience warrants abridgment of First Amendment freedoms, even where it is shown to flow directly and immediately from their exercise. E.g., *Schneider v. State*, 308 U.S. 147, 162 (1939).

The third standard requires that the police attempt first to restrain the heckler, and that they turn to the speaker only when and if the heckler cannot otherwise be restrained. See, *e.g.*, *Edwards v. South Carolina*, 372 U.S. 229, 236-237 (1963); *Cox v. Louisiana*, 379 U.S. 536, 550-551 (1965).

The fourth standard requires a showing of specific intent to provoke violence. This requirement serves the same necessary protective function in breach-of-the-peace cases as the requirement of *scienter* in obscenity cases, *Smith v. California*, 361 U.S. 147

of them are necessary to guard against the demonstrated dangers of repression of free speech by the breach-of-the-peace laws,[23] we recognize that their comprehensive enunciation would go significantly beyond anything the Court has yet said on the subject. On the other hand, rejection of any of these standards would also plow new ground and, we believe, sow the seeds of incalculable mischief. We have stated what we believe to be the minimally acceptable constitutional tests, not to urge their adoption in the present case, but to indicate the complexity of the issues involved in their formulation. The present case, plainly, does not lend itself to resolution of those complexities.

This is so not merely because narrower and simpler grounds compel reversal (Part III, *infra*), but also because the contours of California's breach-of-the-peace law, Penal Code §415, are unclear in several relevant dimensions. Following the decisions of all of the lower courts in appellant's case, the California Supreme Court announced the first authoritative construction of §415. *In re Bushman*, 1 Cal.3d 767, 463 P.2d 727, 83 Cal.Rptr. 375 (1970). That court said:

> "[The relevant part of §415] provides: 'Every person who maliciously and willfully disturbs the

(1959), and the requirement of actual malice in libel cases, *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

The fifth standard requires that provocation, to be punishable, be "so inherently inflammatory as to come within that small class of 'fighting words' which are 'likely to provoke the average person to retaliation, and thereby cause a breach of the peace.' *Chaplinsky v. New Hampshire*, 315 U.S. 568, 574 (1942)." *Street v. New York*, 394 U.S. 576, 592 (1969). See also *Bachellar v. Maryland*, 397 U.S. 564, 567 (1970).

[23] See pp. 3-8 *supra*.

peace or quiet of any . . . person . . . by tumultuous or offensive conduct . . . is guilty of a misdemeanor.' The terms 'disturb the peace' and 'breach of the peace,' which are substantially synonymous, have long been understood to mean disruption of public order by acts that are themselves violent or that tend to incite others to violence. Thus, one may be guilty of disturbing the peace within that part of section 415 if he engages in 'tumultuous' conduct, i.e., violent conduct that wilfuly [sic] and maliciously endangers public safety or order. He may also be guilty of disturbing the peace through 'offensive' conduct if by his actions he wilfully and maliciously incites others to violence or engages in conduct likely to incite others to violence. (*People* v. *Cohen* (1969) 1 Cal.App.3d 94, 101 [the instant case].

". . . that part of Penal Code section 415 in question here makes punishable only wilful and malicious conduct that is violent and endangers public safety and order or that creates a clear and present danger that others will engage in violence of that nature.

". . . [It] does not make criminal any nonviolent act unless the act incites or threatens to incite others to violence. . . ." (1 Cal.3d, at 773-774, 463 P.2d, at 730-731, 83 Cal.Rptr., at 378-379.)

The *Bushman* opinion thus appears to adopt a "clear and present danger" test to describe the nexus between non-violent speech and feared violent consequences that is required before the speech can be punished as provocative of the consequences under §415. But even this explicit statement is cast in doubt by

alternative formulations ("likely to incite," "threatens to incite") which do not smack of "clear and present danger"—and by citation of the present case wherein, as we shall see (Section III (B) *infra*), appellant's conviction neither was nor could have been based on a finding of "clear and present danger" of violence. Beyond this, *Bushman* is unilluminating concerning the scope of §415: whether, for example, the section punishes one whose ideas, as distinguished from the form or circumstances of their expression, are provocative in the requisite degree; whether, in this or other regards, there is any distinction to be drawn between provoking a sympathetic response and provoking a hostile one; whether the response whose provocation is punishable is limited by any requirement of imminence, or seriousness, or reasonableness on the part of the respondent, or unamenability to police control; whether, finally, the provocation needs to be intentional, or whether the stated requirements of "wilfulness" and "maliciousness" refer merely to the fact of utterance of speech that is subsequently adjudged provocative.

Without some clearer definition of the crime denounced by §415, we suggest that it would be profitless and ill-advised for this Court to grapple with broad questions of its constitutionality, or to undertake the difficult task of formulating ultimate constitutional standards that breach-of-the-peace legislation of its general sort must meet. Rather, this case should be decided upon narrower and surer grounds. And if such a limited disposition is made, we strongly hope

that the same considerations will urge the Court to avoid any possible intimation of approval of §415. For, as we have seen, both the statute and the constitutional issue that it implicates are full of nettles.

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### III. THE GROUNDS FOR REVERSAL

We come now to the grounds upon which reversal of appellant's conviction is required. They are two:

*A. At the time of appellant's trial and conviction, the relevant portion of Penal Code §415 had not been authoritatively construed by the California appellate courts. In terms, it was plainly overbroad and unconstitutional. Since there is no reason to suppose that the trial court read it other than literally, appellant's conviction must be reversed.*

Appellant was charged in relevant part with "disturb[ing] the peace and quiet of the neighborhood . . . and [of some] . . . persons . . . by offensive conduct." (A. 1.) Prior to September 27, 1968, when he was tried and convicted, this portion of Penal Code §415 had not been interpreted by the California courts. It was first explicated by the District Court of Appeal upon appellant's own appeal, a year after his conviction; still later, in January 1970, the California Supreme Court first dealt with a charge of "offensive conduct." *In re Bushman, supra.*

As written, that portion of §415 is quite clearly overbroad and unconstitutional under familiar First Amendment principles. *Terminiello* v. *City of Chicago*, 337 U.S. 1 (1949); *Edwards* v. *South Carolina*, 372

U.S. 229 (1963); *Cox* v. *Louisiana,* 379 U.S. 536 (1965); *Bachellar* v. *Maryland,* 397 U.S. 564 (1970); and see *Ashton* v. *Kentucky,* 384 U.S. 195, 200-201 (1966). Without distinction between ideological and other disturbances—both comprehended within the traditional concept of disturbing the peace[24]—it punishes any disturbance of the peace of another by conduct defined only as "offensive." "But '[i]t is firmly settled that under our Constitution the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers,' *Street* v. *New York,* 394 U.S. 576, 592 (1969)." *Bachellar* v. *Maryland, supra,* 397 U.S., at 567.

The District Court of Appeal below held that appellant's display of the language "Fuck the Draft" was "offensive" because of its tendency to "cause others to rise up to commit a violent act against the person of [appellant] . . . or attempt to forceably remove his jacket." (A. 29.) However, there is no reason to believe that the trial court took this limited view of the notion of offensiveness, or that it thought appellant's escutcheon was "offensive" only in this sense. Particularly since evidence of any "violent act" or the probability of any "violent act" is entirely lacking on this record—and since the trial judge explicitly held that "a conviction under Section 415 for the mere display of the words 'Fuck the Draft' unconnected with any actual or threatened violence does not [vio-

[24]See the *Terminiello, Edwards, Cox* and *Bachellar* cases just cited; and see *Cantwell v. Connecticut,* 310 U.S. 296, 308 (1940).

late the] . . . Constitution" (A. 20)—it is far more plausible to suppose that he found appellant's jacket "offensive" in a broader and more obvious sense which (however much one may privately agree with it) cannot constitute a public crime either under §415 as latterly construed or under the Constitution of the United States. For this reason, *Shuttlesworth* v. *City of Birmingham*, 382 U.S. 87, 91-92 (1965), palpably compels reversal. See also *Ashton* v. *Kentucky*, 384 U.S. 195, 198 (1966).[25]

*B. No factual finding has been made, and the record will not support a finding, of a constitutionally requisite element of the crime of which appellant was convicted: that is, a tendency of his non-violent expression to create violence. The Court of Appeal apparently concluded that "Fuck the Draft," per se, is presumptively likely to lead to violence. This is rationally and constitutionally untenable; and appellant's conviction must be reversed.*

We have noted above that the California Supreme Court's construction of §415 in the *Bushman* case ap-

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[25]We have considered whether, in the circumstances of this case, a remand to the California courts for reconsideration in light of *Bushman* would be appropriate. We are clear that it would not. This Court cannot remand to the California Supreme Court, nor can it compel that court to exercise its discretionary jurisdiction in the matter. The California Supreme Court has had the chance to consider this case, and has advisedly refused to hear it. Remand to the Court of Appeal for reconsideration in light of *Bushman* would be an obvious exercise in futility. For, in view of the approving citation of its present decision in the *Bushman* opinion, the Court of Appeal would quite properly conclude that there is nothing to reconsider. *Bushman* does not purport to modify the California law of §415 as pronounced in *Cohen*, but to confirm it. In this situation, outright constitutional reversal by this Court is the only appropriate course.

pears to require that non-violent conduct, in order to constitute a punishable disturbance of the peace, must create a "clear and present danger" of violence. Whether or not that requirement is a constitutional one (and we have also said above that we think it is[26]), plainly both §415 and the First Amendment require *some* substantial tendency of speech to provoke violence before that speech may be punished on a breach-of-the-peace theory. The Court of Appeal below admitted that §415 reaches only such non-violent conduct as "has a tendency to provoke *others* to acts of violence or to in turn disturb the peace and quiet" (A. 28-29; emphasis in original). There can be no doubt that, in the absence of such a tendency, the Constitution would prohibit the application of §415 to any form of non-violent speech. E.g., *Cox v. Louisiana*, 379 U.S. 536, 549-550 (1965); *Street* v. *New York*, 394 U.S. 576, 592 (1969).

The trial court, of course, made no finding of any such tendency in appellant's case; for it thought, erroneously, that "the mere display of the words 'Fuck the Draft' unconnected with any actual or threatened violence" (A. 20) was punishable. Nor was any evidence introduced which might support a finding that appellant's conduct tended to incite or provoke anyone to any form of violent reaction.[27]

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[26]See note 22, ¶2 *supra*.

[27]"No evidence was offered by the People indicating or tending to indicate that Defendant either engaged in or threatened any acts of violence, or was about to engage in any such acts, or that Defendant by his conduct incited anyone else to any acts of violence, or that any persons observing Defendant engaged in or threatened, or were about to engage in acts of violence." (A. 19.)

Appellant's conviction, therefore, must stand upon the unvarnished proposition, invented by the Court of Appeal, that to wear a jacket labeled "Fuck the Draft" in public, in the presence of women and children (and, apparently, of their adult male protectors), *presumptively* will lead to violence. This proposition is posited not merely as a permissible inference from evidence—since the trial court drew no such inference—but as a presumption which supplies the place of both evidence and inference.

This Court has had frequent occasion to examine the use of presumptions of the sort, through which conduct protected by the Constitution is transmuted by say-so into something else in order to make it punishable. If indulged, this kind of presumption would make all constitutional rights defeasible by fiat. *Bailey* v. *Alabama*, 219 U.S. 219, 239 (1911); and see, e.g., *Morrison* v. *California*, 291 U.S. 82 (1934); *Taylor* v. *Georgia*, 315 U.S. 25 (1942). So, particularly where the rights that they may overreach are the "vulnerable [and] . . . supremely precious" ones guaranteed by the First Amendment,[28] such presumptions must be strictly scrutinized. E.g., *Wood* v. *Georgia*, 370 U.S. 375, 386-389 (1962); *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 283-288 (1964); *Dombrowski* v. *Pfister*, 380 U.S. 479, 494-496 (1965). Specifically, this Court has time and again carefully reviewed, and invariably upset, state court presumptions that particular sorts of speech would, *per se*, lead to violence. *Fiske* v. *Kansas*, 274 U.S. 380 (1927); *Garner* v. *Lou-*

[28] *N.A.A.C.P. v. Button*, 371 U.S. 415, 433 (1963).

*isiana*, 368 U.S. 157 (1961); *Taylor* v. *Louisiana*, 370 U.S. 154 (1962); *Cox* v. *Louisiana*, 397 U.S. 536, 549-550 (1965); *Street* v. *New York*, 394 U.S. 576, 592 (1969).

The presumption that public display of the words "Fuck the Draft" will cause violence does not survive scrutiny under a test of mere rationality, let alone the heightened scrutiny required by the First Amendment. Doubtless many men would be indignant at having their wives or children exposed to these words. We certainly would. But it would never occur to us—or, we suggest—to any ordinary-tempered man, to react with violence against the sign-bearer. If we undertook to fight every man who said or displayed the word "fuck" or equally embarrassing words in public, we would be fighting most of the time. Only gallantry or irascibility of pathological proportions could inspire such a crusade. Clearly, the Court of Appeal has set the boiling-point of violence much too low—or appraised the likelihood of its being reached much too high—to satisfy reason or the First Amendment.

The dangers of this approach for suppression of free expression are obvious. For if "Fuck the Draft" is *per se* punishable in Los Angeles—not as profanity but because of its presumed likelihood to lead to violence—so, *a fortiori*, is "End the War" in down-town Manhattan, or "Black is Beautiful" in Memphis, Louisville or Jackson. Free speech is not, we think, so lightly to be stifled upon the basis of vagrant fears of unreasonable, hostile reaction.

## CONCLUSION

Appellant's conviction should be reversed.

Respectfully submitted,

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1970

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No. 299

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PAUL ROBERT COHEN,

*Appellant,*

v.

CALIFORNIA,

---

APPEAL FROM THE COURT OF APPEAL OF
CALIFORNIA SECOND APPELLATE DISTRICT

---

## BRIEF FOR APPELLANT

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1970

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No. 299

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PAUL ROBERT COHEN,

*Appellant,*

v.

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APPEAL FROM THE COURT OF APPEAL OF
CALIFORNIA SECOND APPELLATE DISTRICT

---

## BRIEF FOR APPELLANT

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### INTRODUCTION

Appellant appeals from a judgment of the Court of Appeal, Second Appellate District, State of California, entered October 22, 1969 (A. 26), affirming a judgment of conviction entered by the Municipal Court of the Los Angeles Judicial District, State of California, on September 27, 1968 (A. 8). Appellant was charged with "engaging in

tumultuous and offensive conduct" in violation of the California disturbing-the-peace statute, section 415 of the California Penal Code (A. 1). The said Municipal Court, sitting without a jury, found Appellant guilty, and sentenced Appellant to thirty days in county jail (A. 8).

Upon appeal to the Appellate Department of the Superior Court the judgment was reversed on January 20, 1969 (A. 10). Thereafter State petitioned for rehearing or certification to the Court of Appeal. The Appellate Department granted rehearing (A. 12), and the matter was orally argued for a second time. On May 23, 1969, the Appellate Department once again reversed the judgment of conviction (A. 13). The State again petitioned for certification to the Court of Appeal. The Appellate Department granted the petition and issued an order certifying the cause to be transferred to the California Court of Appeal (A. 23). The Court of Appeal, Second Appellate District, ordered such transfer (A. 25), heard the case on appeal, and affirmed the judgment of conviction (A. 26). Appellant filed a Petition for Rehearing before the Court of Appeal, and said Petition was denied on November 13, 1969 (A. 36). Appellant then filed a Petition for Hearing before the California Supreme Court, and said Petition was denied on December 17, 1969 (A. 36). It is of some significance to note that the Petition for Hearing was denied by the California Supreme Court by a 4-to-3 vote, with Chief Justice Traynor, and Justices Peters and Tobriner dissenting (A. 36).

## OPINIONS BELOW

The trial judge in the Municipal Court did not render a written opinion. The Appellate Department of the Superior Court in reversing the judgment of conviction rendered an unreported Memorandum Opinion and Judgment on January 20, 1969 (A. 10). Upon rehearing, the Appellate Department of the Superior Court on May 23, 1969, in once again reversing the judgment of conviction, rendered

a second unreported Memorandum Opinion and Judgment (A. 13). The Court of Appeal, in affirming the judgment of conviction, rendered an opinion (A. 26), which has been reported in 1 Cal. App. 3d 94, 81 Cal. Rptr. 503 (1969).

## JURISDICTIONAL GROUNDS

Appellant was convicted of violation of section 415 of the California Penal Code. After reversal by the Appellate Department of the Superior Court (see Introduction), the conviction was ultimately affirmed by the Court of Appeal, Second Appellate District, State of California, on October 22, 1969. Petition for Rehearing before the Court of Appeal was denied on November 13, 1969 (A. 36). In view of the fact that the California Supreme Court thereafter declined to hear the case by denying Appellant's Petition for Hearing (A. 36), the judgment of the said Court of Appeal constitutes a judgment rendered by the highest court of the State of California in which a decision can be had within the meaning of 28 U.S.C. section 1257. (*American Railway Express Co. v. Levee*, 263 U.S. 19, 68 L. Ed. 140 (1923).) The California Supreme Court denied Appellant's Petition for Hearing on December 17, 1969 (A. 36), and the time for bringing this appeal is measured from the date of such denial. (*American Railway Express Co. v. Levee, supra.*) The validity of section 415 of the California Penal Code was drawn in question on the ground of its being repugnant to the First and Fourteenth Amendments of the United States Constitution, and both the trial court (A. 21) and the Court of Appeal (A. 30) rendered decision in favor of the validity of said section 415. It follows, therefore, that an appeal will lie before this Court pursuant to 28 U.S.C. section 1257(2). Notice of Appeal to this Court was filed in the Court of Appeal, Second Appellate District, State of California, on February 20, 1970. The case was docketed in this Court on March 5, 1970 (see Appendix, cover). Jurisdiction was postponed to the hearing of the case on the merits, and the case was trans-

ferred to the appellate docket and placed on the summary calendar on June 22, 1970 (A. 37).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional provisions involved are the First and Fourteenth Amendments, U.S. Const., Amend. I, Amend. XIV, Sec. 1.

The statutory provision involved is that portion of section 415, California Penal Code, relating to "offensive conduct." Section 415 reads in its entirety as follows:

> "*Disturbing the peace; noise; use of public streets of unincorporated town for offensive conduct, horse racing, or shooting; indecent language; punishment*
>
> "Every person who maliciously and willfully disturbs the peace or quiet of any neighborhood or person, by loud or unusual noise, or by tumultuous or offensive conduct, or threatening, traducing, quarreling, challenging to fight, or fighting, or who, on the public streets of any unincorporated town, or upon the public highways in such unincorporated town, run any horse race, either for a wager or for amusement, or fire any gun or pistol in such unincorporated town, or use any vulgar, profane, or indecent language within the presence or hearing of women or children, in a loud and boisterous manner, is guilty of a misdemeanor, and upon conviction by any Court of competent jurisdiction shall be punished by fine not exceeding two hundred dollars, or by imprisonment in the County Jail for not more than ninety days, or by both fine and imprisonment, or either, at the discretion of the Court." (Enacted 1872. As amended Code Am. 1877-8, c. 299, p. 117, § 1.)

## QUESTIONS PRESENTED

1. Can one who publicly exhibits in writing the words "Fuck the Draft" be denied the guarantees of freedom of speech under the First and Fourteenth Amendments on the ground that the exhibition of such writing "had a tendency to incite others to violent behavior or to disturb the peace" (A. 29) where the trial court found that: "No evidence was offered by the People indicating or tending to indicate that Defendant either engaged in or threatened any acts of violence, or was about to engage in any such acts, or that Defendant by his conduct incited anyone else to any acts of violence, or that any persons observing Defendant engaged in or threatened, or were about to engage in acts of violence" (A. 19)?

2. Is it a denial of liberty without due process of law in violation of the Fourteenth Amendment to sentence the Appellant to 30 days in jail on the ground that his exhibition in writing of the words "Fuck the Draft" "had a tendency to incite others to violent behavior or to disturb the peace" (A. 29) in view of the finding of the trial court that there was no evidence "that any persons observing Defendant engaged in or threatened, or were about to engage in acts of violence" (A. 19)?

3. Can the expression of words stating a political opinion be punished, notwithstanding the First and Fourteenth Amendments, on the ground that such expression creates a *tendency* that others will respond with violent behavior, where there is an absence of any evidence of a *likelihood* that such a violent response would in fact occur?

4. Does the so-called "fighting words" exception to First Amendment protection apply where the words expressed are critical of a political institution (*i.e.*, the Selective Service System) and not of any individual persons to whom the expression may be addressed, or to any other individual persons?

a. Can such words be considered to be "likely to provoke the average person to retaliation, and thereby cause a breach of the peace"?

b. Even if violent retaliation by persons viewing the words were likely, does this justify silencing the speaker in the absence of proof that the police are incapable of controlling such violent retaliation?

5. Are the words "Fuck the Draft" obscene in a constitutional sense?

a. Does the dominant theme of these words taken as a whole appeal to a prurient interest in sex?

b. Are these words patently offensive because they affront community standards relating to the description or representation of sexual matters?

c. Are these words utterly without redeeming social value?

d. Can these words be regarded as obscene if the answer to either a, b or c of this Question 5 is "No"?

6. If the words "Fuck the Draft" are not obscene in a constitutional sense, may their expression nevertheless be punished, despite the First and Fourteenth Amendments, on the ground that non-obscene profanity is offensive to others?

7. Can non-obscene speech (and particularly speech expressing a political point of view) ever be abridged simply because others find the expression offensive?

8. Is there a "non-speech element" which justifies abridging Appellant's freedom of speech by reason of the fact that he expressed himself in the corridor of a public building when his physical presence and demeanor in such corridor (as distinguished from the words he expressed) was neither illegal, nor objected to by any authorities?

9. Is a criminal statute which punishes speech as a form of "offensive conduct" without specifying which forms of speech will constitute such "offensive conduct" unconstitu-

tionally overbroad in its chilling effect on freedom of speech?

10. If the answer to Question 9 is "yes," is the statute rendered constitutionally valid by a judicial construction which limits its application to speech where there is a *tendency* that the audience for such speech might so object to the speech as to resort to violence, but under such construction speech may be punished even though there is no likelihood that such violence will in fact occur?

11. Is a statute as described in Questions 9 and 10 unconstitutionally vague?

## STATEMENT OF THE CASE

While in the courthouse corridor outside Division 20 of the Los Angeles Municipal Court, Appellant wore a jacket upon which were inscribed the words "Fuck the Draft" (A, 18). Also inscribed on the jacket were the words "Stop War" and two "peace symbols" (A. 19). Women and children were present in said corridor (A. 18). Appellant neither engaged in, threatened, nor incited any acts of violence (A. 19), nor were any other persons in the said corridor engaged in, threatening, or about to engage in acts of violence (A. 19). Appellant at no time caused the emission of any loud or unusual noises (A. 19). Appellant testified that by wearing the jacket as thus inscribed the public was made aware of the depth of feeling against the draft shared by himself and his friends (A. 19-20), and that he had no wish to vex, annoy, or injure others (A. 20).

Appellant was charged with "engaging in tumultuous and offensive conduct" in violation of section 415 of the Penal Code. He was convicted, and sentenced to 30 days in county jail (A. 8).

The constitutional issues here raised were first raised at trial on Appellant's motion to suppress evidence on constitutional grounds (A. 4). They were raised once again after

the evidence was admitted on Appellant's motion for entry of judgment of acquittal under California Penal Code section 1118 (A. 7). In each instance the trial court expressly held that Appellant could be convicted of violation of Penal Code section 415 without abridging his rights under the First and Fourteenth Amendments (A. 20-21), and that section 415 is not invalid on its face in that it is neither unconstitutionally vague (A. 21) nor unconstitutionally overbroad (A. 21). In addition, the trial court held that the words "Fuck the Draft" are "obscene" within the constitutional meaning of that word (A. 20).

The same constitutional issues were briefed and argued at each succeeding proceeding in this case. See generally the Court of Appeal's discussion of Appellant's position (A. 26-35).

## SUMMARY OF ARGUMENT

Appellant was clearly engaging in speech, and such speech is entitled to First and Fourteenth Amendment protection because it neither contained nor was it accompanied by any of the elements which this Court has heretofore recognized as justifying abridgment of freedom of speech.

There was no threat of violence such as to justify abridgment of Appellant's speech. The Settled Statement makes clear that there was no likelihood of violence either from Appellant or from anyone viewing his words. The trial court erroneously held that no violence potential need be shown in order to convict for the use of words which constitute "offensive conduct." This in itself requires reversal. But even under the construction adopted by the Court of Appeal it is clear that a mere "tendency" that violence *might* result from some unidentified bystanders is too remote a danger to justify abridgment of speech (Argument I A (1)).

Even if there were a likelihood of violence by those opposing Appellant's speech, this in itself would not justify

vitiating Appellant's First Amendment rights, at least in the absence of a showing that the police were unable to restrain those who would resort to violence (Argument I A (2)).

The so-called "fighting words" doctrine is not here applicable because there was no showing of a likelihood that a breach of the peace would result from Appellant's words, and further because Appellant's words were not "fighting words" in the sense of attacking or criticizing those to whom the words were being addressed (Argument I A (3)).

Appellant's words were not "obscene" in the constitutional sense as this Court has defined obscenity in that the dominant theme of the words "Fuck the Draft" does not appeal to a prurient interest in sex, the words are not patently offensive by reason of affronting contemporary community standards relating to the description or representation of sexual matters, and the words are not utterly without redeeming social value (Argument I B).

There were no time, place or manner "non-speech" elements justifying the denial of First and Fourteenth Amendment protection for Appellant's speech. Appellant had every right to be where he was, his manner was neither loud nor unruly, and the only objection by the authorities was to Appellant's speech itself (Argument I C).

The fact that Appellant's speech may have been offensive to some persons does not justify the abridgment of his speech. The First Amendment is equally applicable to offensive and non-offensive speech (Argument II A).

Fundamental First Amendment theory requires protection for speech such as that employed by Appellant. A free marketplace of ideas, or democratic dialogue, is essential for a self-governing people to be able to make informed decisions (Argument II B (1) (a)).

The democratic dialogue would not function properly if the state could censor the form (*i.e.*, particular words chosen to express an idea) of speech even if there were no censorship of the ideas conveyed. In this case if Appellant

had expressed himself in a more polite manner the self-governing people would not have been apprised of the depth of feeling against the draft shared by Appellant and his friends. More fundamentally, if the state could censor the emotive content of speech, even though it did not censor the intellectual content, the state could thereby to a large extent determine to which members of the public a given speech will appeal, and could thus largely influence whether a particular idea will prevail in the marketplace. For this reason it is clear that speech to be protected by the First and Fourteenth Amendments need not be "polite" (Argument II B (1) (b)).

Profanity has become a vital ingredient in the language of dissent as used by many young people, and by many members of minority groups. If the use of such words were to be legally proscribed, the language of dissent, and hence the democratic dialogue, would be severely inhibited (Argument II B (1) (c)).

Furthermore, society at large now tolerates and even rewards the use of the word "fuck" in the arts and in motion pictures. It would be ludicrous to jail Appellant for the use of a word which appears in seven out of the ten best-selling works of fiction, and which is generally acceptable to a large segment of society (Argument II B (1) (d)).

It may not be argued that those who viewed Appellant's words constituted a "captive audience" since at most they were required to fleetingly glance at such words. If such a casual and fleeting contact by an unwilling audience justifies abridgment of speech, then street-corner speakers, radio and television broadcasters and many others whose statements may be offensive to some listeners could be silenced, and the democratic dialogue would be stultified. In this regard, it adds nothing analytically to refer to the "shock" effect of Appellant's words, since this is but a different label for highly offensive words, and offensiveness *per se* does not vitiate First Amendment rights (Argument II B (1) (e)).

Freedom of speech is also important as an end in itself, in that it serves the function of self-fulfillment. This is true of four-letter words both for literary and psychological reasons (Argument II B (2)).

Finally, freedom of speech serves a safety-value function, as men are less inclined to resort to violence to achieve given ends if they can freely express themselves verbally with respect to such ends. The cathartic effect of four-letter-word speech is confirmed by psychological authorities (Argument II B (3)).

Section 415 of the California Penal Code, as construed by the California courts, is unconstitutionally vague and overbroad. Under the Court of Appeal's construction, if there is a mere possibility that someone might be offended by given words and might therefore resort to violence, such words may constitute "offensive conduct" within the meaning of the statute. This is both overly vague and overbroad in applying an impermissible standard. The construction of section 415 by the California Supreme Court in a subsequent case does not save the statute from vulnerability both on grounds of vagueness and overbreadth (Argument III).

## ARGUMENT

### I

**APPELLANT'S SPEECH IS ENTITLED TO FIRST AMENDMENT PROTECTION FOR THE REASON THAT SUCH SPEECH NEITHER CONTAINED NOR WAS IT ACCOMPANIED BY ANY OF THE ELEMENTS WHICH THIS COURT HAS HERETOFORE RECOGNIZED AS JUSTIFYING THE EXCLUSION OF SPEECH FROM FIRST AMENDMENT PROTECTION.**

We begin with the incontrovertible fact that Appellant was engaging in speech. Since his expression was formulated in words, and since he was arrested because of his words (A. 18-20), there is presented in this case, at least *prima facie*, an abridgment of Appellant's freedom of speech in violation of the First and Fourteenth Amend-

ments. Highly respected authority has advanced the view that speech is entitled to First Amendment protection "without any ifs, buts, or whereases." *(Beauharnais v. Illinois,* 343 U.S. 250, 275 (Mr. Justice Black dissenting).) Appellant need not and does not here argue, however, that speech in any and all circumstances is necessarily entitled to First Amendment protection. This Court has through the years formulated a number of grounds for excluding certain speech in certain circumstances from the ambit of the First Amendment. But where, as here, the issue is clearly one of speech, First Amendment protection must be forthcoming unless one of the exclusionary grounds recognized by this Court can be shown to be applicable. For reasons which are demonstrated below, no such exclusionary ground pertains in this case.

**A. There Was No Threat of Violence Either by Appellant or by Others Observing Appellant Such As To Justify Abridging Appellant's Speech.**

(1) *The Grounds Relied Upon by the Court of Appeal Were Erroneous in That the Settled Statement Clearly Establishes That There Was No Likelihood of Violence, and a Mere "Tendency" That Violence Might Result from Speech Is a Constitutionally Impermissible Standard.*

It should first be observed that although the California Court of Appeal in its opinion below required an element of potential violence as a necessary concomitant of "offensive conduct" under the California disturbing-the-peace statute (Penal Code section 415), this was directly contrary to the construction of the statute adopted by the trial court. The trial court ruled that "offensive conduct" within the meaning of the statute "may consist of written words unaccompanied by any actual or threatened violence" (A. 20). For reasons which are set forth below, the element of potential violence is a constitutional necessity in order to validate a statute which purports to punish speech as a form of

"offensive conduct." At the outset, then, it is clear that Appellant's conviction must be reversed even if the construction gloss placed upon section 415 by the Court of Appeal were such as to render the statute constitutional. As this Court stated in *Ashton v. Kentucky,* 384 U.S. 195, 198, 16 L. Ed. 2d 469, 471, 86 S. Ct. 1407 (1966): ". . . where an accused is tried and convicted under a broad construction of an Act which would make it unconstitutional, the conviction cannot be sustained on appeal by a limiting construction which eliminates the unconstitutional features of the Act, as the trial took place under the unconstitutional construction of the Act."

But even if it were assumed that the construction of section 415 adopted by the California Court of Appeal were the same as that followed by the trial court, the conviction still cannot stand, since such construction is itself squarely in violation of the principles laid down by this Court when it considered similar disturbing-the-peace statutes in *Edwards v. South Carolina,* 372 U.S. 229, 9 L. Ed. 2d 697, 83 S. Ct. 680 (1963), and in *Cox v. Louisiana,* 379 U.S. 536, 13 L. Ed. 2d 471, 85 S. Ct. 453 (1965). In essence, the Court of Appeal in the instant case found that speech alone could constitute disturbing the peace under the California statute provided only that such speech "tends to provoke others to break the peace" (A. 28), or that it "*might* cause others to rise up to commit a violent act" (A. 29, emphasis added). In approving this construction of the California statute, the Court of Appeal ignored its earlier general statement that speech in order to be punished as a disturbance of the peace must be "*likely* to create a disturbance" (A. 28). In order to uphold a conviction in the instant case the Court of Appeal was required to approve the lower standard of a "tendency" rather than a "likelihood" that speech will result in violence by others. This for the reason that the record is entirely devoid of evidence indicating any such likelihood. It is clear, of course, that if there is no evidence in the record to support a conviction, such a conviction constitutes a denial of due process in violation

of the Fourteenth Amendment. *Thompson v. Louisville*, 362 U.S. 199, 4 L. Ed. 2d 654, 80 S. Ct. 624 (1960); *Garner v. Louisiana*, 368 U.S. 157, 7 L. Ed. 2d 207, 82 S. Ct. 248 (1961) (disturbing-the-peace statute).

Nothing could be clearer than the teachings of this Court that speech may not be abridged in the absence of a likelihood of resulting violence, simply because the authorities conclude that there is a "tendency" that the speech might stir some members of the audience to violence. In *Edwards v. South Carolina, supra,* convictions under a disturbing-the-peace statute were overturned by this Court upon its finding that: "There was no violence or threat of violence upon [petitioners'] part, or on the part of any member of the crowd watching them." (372 U.S. at p. 236; 9 L. Ed. 2d at p. 702.) This is exactly parallel to the present case, where the trial judge found that "No evidence was offered by the People indicating or tending to indicate that Defendant either engaged in or threatened any acts of violence, or was about to engage in any such acts, or that Defendant by his conduct incited anyone else to any acts of violence, or that any persons observing Defendant engaged in or threatened, or were about to engage in acts of violence" (A. 19). In fact, in *Edwards* the possibility of audience violence was measurably greater because there the views expressed "were sufficiently opposed to the views of the majority of the community to . . . necessitate police protection." (372 U.S. at p. 237, 9 L.Ed. 2d at p. 703.) No such police protection was required in the instance case in order to avoid actual or threatened violence.

In *Cox v. Louisiana, supra,* the trial judge upheld convictions under a breach-of-the-peace statute on the ground that it was "inherently dangerous" for "colored people" to demonstrate in "the predominantly white business district in the City of Baton Rouge" (379 U.S. at p. 550, 13 L. Ed. 2d at p. 481), and the State there argued that conviction was warranted by reason of the "fear of violence . . . based upon the reaction of the group of white citizens looking on

from across the street." (379 U.S. at p. 550, 13 L. Ed. 2d at p. 481.) There was testimony, however, that the police "could have handled the crowd" (379 U.S. at p. 550, 13 L. Ed. 2d at p. 481). This Court, in reversing the convictions, concluded that "the 'compelling answer . . . is that constitutional rights may not be denied simply because of hostility to their assertion or exercise.'" (379 U.S. at p. 551, 13 L. Ed. 2d at p. 482.)

Indeed, if the standard adopted by the Court of Appeal in the present case had been accepted by this Court, Negro demonstrators in the South long ago would have been silenced, for to paraphrase the language of the Court of Appeal in the present case, "It was certainly reasonably foreseeable that [Negro civil rights demonstrators in Southern towns in peacefully expressing their views, by such] conduct *might* cause others to rise up to commit a violent act against the person of the [demonstrators]" (A. 29, emphasis added.) That this is not a constitutionally adequate standard to justify the abridgment of speech is abundantly clear from this Court's rulings. Nor is the standard any more acceptable outside the context of Negro civil rights. Through the years this Court has repeatedly made clear that "neither 'inherent tendency' nor 'reasonable tendency' is enough to justify a restriction of free expression." (*Bridges v. California*, 314 U.S. 252, 273, 86 L. Ed. 192, 208, 62 S. Ct. 190, 198 (1941)). Recently, in the context of a case involving a criminal syndicalism statute, this Court affirmed "the principle that the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or law violation except where such advocacy is directed to inciting or producing imminent lawless action and is *likely* to incite or produce such action." *Brandenburg v. Ohio*, 395 U.S. 444, 447, 23 L. Ed. 2d 430, 434, 89 S. Ct. 1827 (1969) (emphasis added).

Indeed, in the same context as the instant case, *i.e.* an expression of dissent against the Vietnam War, this Court held that the fact that some unknown person or persons

*might* decide to use violence to put down a speaker is much too remote a danger to justify punishing the speaker. Thus, in *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 508-09, 21 L. Ed. 2d 731, 739, 89 S. Ct. 733 (1969), this Court stated:

> "The District Court concluded that the action of the school authorities was reasonable because it was based upon their fear of a disturbance from the wearing of the armbands [opposing the Vietnam War]. But, in our system, *undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression.* Any departure from absolute regimentation may cause trouble. Any variation from the majority's opinion may inspire fear. Any word spoken, in class, in the lunchroom, or on the campus, that deviates from the views of another person may start an argument or cause a disturbance. But *our Constitution says we must take this risk, Terminiello v. Chicago*, 337 U.S. 1, 69 S. Ct. 894, 93 L. Ed. 1131 (1949); and our history says that it is this sort of hazardous freedom - this kind of openness - that is the basis of our national strength and of the independence and vigor of Americans who grow up and live in this relatively permissive, often disputatious, society." (Emphasis added.)

Recognizing the constitutional problems of vagueness and overbreadth, the California Supreme Court, after it denied a hearing in the present case (A. 36), ruled in *In re Bushman*, 1 Cal. 3d 767, 83 Cal. Rptr. 375 (1970), that the same statute as is in issue in the present case, Penal Code section 415, "makes punishable only willful and malicious conduct that is violent and endangers public safety and order or that creates a clear and present danger that others will engage in violence of that nature." (1 Cal. 3d at 773; 83 Cal. Rptr. at 379.) But even in the *Bushman* decision, the California Supreme Court apparently equated the "clear and present danger" standard referred to above with acts "that *tend* to incite others to violence." (1 Cal. 3d at 773,

83 Cal. Rptr. at 378.) (Emphasis added.)[1] In any event, "the crucial question is not the formal interpretation of the statute by the Supreme Court of [California] but the application given it." (*Herndon v. Lowry*, 301 U.S. 242, 260, 81 L. Ed. 1066, 1076, 57 S. Ct. 732 (1937).) This Court has not hesitated to reverse a state conviction in violation of First Amendment rights even where subsequent to such conviction the highest state court has construed the statute in question so as to "pass constitutional muster." (*Shuttlesworth v. Birmingham*, 394 U.S. 147, 155, 22 L. Ed. 2d 162, 169, 89 S. Ct. 935 (1969); see also *Ashton v. Kentucky*, 384 U.S. 195, 16 L. Ed. 2d 469, 86 S. Ct. 1407 (1966). As Mr. Justice Black, joined by Mr. Justice Douglas, said in a concurring opinion in *Gregory v. Chicago*, 394 U.S. 111, 113, 122, 22 L. Ed. 2d 134, 137, 142, 89 S. Ct. 946 (1969): "Whatever the validity of the Illinois Supreme Court's construction, this was simply not the theory on which these petitioners were convicted."

(2) *Even If There Were a Likelihood of Violence by Those Opposing Appellant's Speech, the First Amendment Does Not Vest a Veto Power in a Hostile Audience.*

If a speaker's right to express himself could be constitutionally obliterated because his audience so strongly disagrees with the words he speaks that they are willing to resort to violence, this would in effect limit First Amendment rights to expressions which are not sharply controversial.

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[1] In *Bushman* the California Supreme Court cited the Court of Appeal decision in the present case as standing for the proposition that "offensive conduct" must be "conduct *likely* to incite others to violence" (1 Cal. 3d at 773, 83 Cal. Rptr. at 378) (emphasis added). By reason of the Settled Statement in the present case (A. 19), it is clear that in fact Appellant's conduct was not "likely" to incite others to violence. It is of some interest to note that the *Bushman* opinion for the California Supreme Court was written by Mr. Chief Justice Traynor, who dissented from the same court's denial of a hearing in the present case (A. 36).

It would further encourage hostile audiences to express their hostility through violence as a constitutionally efficacious way of removing the speaker's right to speak. It would mean, for example, that college students could, by threatening or engaging in violence, revoke a speaker's constitutional right to appear and speak on campus. This very issue was presented in *Stacy v. Williams*, 306 F. Supp. 963 (N.D. Miss. 1969), which struck down a proposed regulation providing that "no person shall be permitted to use [state college facilities] whose presence will constitute a clear and present danger of inciting a riot on any campus thereof." The three-judge court in *Stacy* concluded: "One simply cannot be restrained from speaking, and his audience cannot be prevented from hearing him, unless the feared result is likely to be engendered by what the speaker himself says or does. In such circumstances envisioned by this proposed regulation, attendant law enforcement officers must quell the mob, not the speaker." (306 F. Supp. at 977.)

That a hostile audience may not exercise a First Amendment veto power was made clear in *Terminiello v. Chicago*, 337 U.S. 1, 93 L. Ed. 1131, 69 S. Ct. 894 (1949). In that case, the defendant spoke under the auspices of the Christian Veterans of America, while a crowd of one thousand persons gathered outside the building in which the speaker appeared. The crowd was "angry and turbulent" and the defendant in his speech condemned the conduct of the crowd and "vigorously, if not viciously, criticized various political and racial groups." The defendant was convicted under a charge of breach of the peace, which was construed by the trial court to include speech "which stirs the public to anger, invites dispute, brings about a condition of unrest, or creates a disturbance." This Court reversed the defendant's conviction on the ground that the breach-of-the-peace statute as construed by the trial court constituted a violation of free speech. This Court said:

> ". . . a function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition

> of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea." (337 U.S. at 4.)

The subsequent decision by this Court in *Feiner v. New York,* 340 U.S. 315, 95 L. Ed. 295, 71 S. Ct. 303 (1951), may be viewed as a departure from the principle that a hostile audience may not revoke a speaker's right to speak. If so, decisions by this Court following *Feiner* clearly spell out a return to the principle of *Terminiello.* In overturning a breach-of-the-peace conviction in *Cox v. Louisiana,* 379 U.S. 536, 13 L. Ed. 2d 471, 85 S. Ct. 453 (1965), this Court concluded that even if "'the opinions which . . . [the defendants] were peaceably expressing were sufficiently opposed to the views of the majority of the community to attract a crowd and necessitate police protection' . . . the 'compelling answer . . . is that constitutional rights may not be denied simply because of hostility to their assertion or exercise.'" (379 U.S. at 551, 13 L. Ed. 2d at 482.) Similarly, the First Amendment rights of speakers were upheld even though hostile audiences did "necessitate police protection" in *Edwards v. South Carolina,* 372 U.S. 229, 237, 9 L. Ed. 2d 697, 704, 83 S. Ct. 680 (1963), and in *Henry v. Rock Hill,* 376 U.S. 776, 778, 12 L. Ed. 2d 79, 81, 84 S. Ct. 1042 (1964). Indeed, in *Gregory v. Chicago,* 394 U.S. 111, 22 L. Ed. 2d 134, 89 S. Ct. 946 (1969), this Court reversed convictions under a Chicago disorderly conduct ordinance (prohibiting "breach of the peace") where the defendants' conduct was peaceful and orderly, even though in that case the police were "unable to restrain the hostile hecklers within decent and orderly bounds." (Concurring opinion by Mr. Justice Black, 394 U.S. 111, 113, 117, 22 L. Ed. 2d 134, 137, 139.) In *Bachellar v. Maryland,* 397 U.S. 564, 25 L. Ed. 2d 570, 90 S. Ct. 1312.

(1970), the defendants had been convicted under a "disturbance of the public peace" statute. The trial judge had refused defendants' requested jury instruction that "if the only threat of public disturbance arising from the actions of these defendants was a threat that arose from the anger of others who were made angry by their disagreement with the defendants' expressed views concerning Viet Nam, or American involvement in Viet Nam, you must acquit these defendants." (397 U.S. at 566, 25 L. Ed. 2d at 573, 90 S. Ct. at 1313.) This Court reversed the convictions on the ground that the jury may have found the defendants guilty "because their anti-Vietnam protest amounted to 'the doing or saying . . . of that which offends, disturbs, incites, or tends to incite a number of people gathered in the same area.'" Conviction on this ground, it was concluded, would violate the Constitution. This Court once again reminded us that "'it is firmly settled that under our Constitution the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers,' . . . or simply because bystanders object to peaceful and orderly demonstrations." (397 U.S. at 567, 25 L. Ed. 2d at 574, 90 S. Ct. at 1314.) In sum, a statute is unconstitutional if it "'makes a man a criminal simply because his neighbors have no self-control and cannot refrain from violence.' (Chafee, Free Speech in the United States, 151 (1954))." (*Ashton v. Kentucky*, 384 U.S. 195, 200, 16 L. Ed. 2d 469, 473, 86 S. Ct. 1407 (1966).)

The above decisions, then, make clear that even if, contrary to fact, the record revealed a likelihood of violent acts by persons hostile to Appellant's words, this in itself would not vitiate Appellant's right to freedom of speech under the First Amendment. Particularly is this so where there is no showing of police inability to quell such violence.

(3) *Even if a Violent Response to "Fighting Words" Would Constitutionally Justify Silencing the Speaker, the "Fighting Words" Doctrine Is Not Applicable in the Present Case.*

The Court of Appeal below attempted to invoke the "fighting words" concept mentioned in *Chaplinsky v. New Hampshire*, 315 U.S. 568, 86 L. Ed. 1031, 62 S. Ct. 766 (1942) (see A. 31). But this does not aid the State's position for several reasons. First, and most basically, the *Chaplinsky* "fighting words" concept related to such words as are "*likely* to cause a fight" (315 U.S. at 573); those that are "*plainly likely* to cause a breach of the peace by the addressee" (315 U.S. at 573) (emphasis added); "epithets *likely* to provoke the average person to retaliation, and thereby cause a breach of the peace" (315 U.S. at 574) (emphasis added). Thus, even under *Chaplinsky* there must be a likelihood or probability that the words will cause an addressee to resort to violence. The mere possibility of violence is not enough, which returns us to the post-*Chaplinsky* cases discussed in Argument I A (1) above. In addition, it is to be noted that "fighting words" as used in *Chaplinsky* are synonymous with "insulting" words (315 U.S. at 572), *i.e.* words of abuse referring to the person addressed. Thus, in *Chaplinsky* it was found that "the appellations 'damned racketeer' and 'damned Fascist' are epithets likely to provoke the average person to retaliation . . . ." (315 U.S. at 574.) *Chaplinsky*, then, was an instance of what this Court had earlier described in *Cantwell v. Connecticut*, 310 U.S. 296, 309, 84 L. Ed. 1213, 1221, 60 S. Ct. 900, 906 (1940), as breach-of-the-peace convictions for statements "likely to provoke violence and disturbance of good order" wherein this Court found that "examination discloses that, in practically all [such convictions], the provocative language which was held to amount to a breach of the peace consisted of profane, indecent, or abusive remarks *directed to the person of the hearer*" (emphasis added). Contrast this with the phrase "Fuck the Draft" as used by Appellant.

These words did not criticize, no less verbally attack those who viewed the sign. It is the insitution of the draft, and not persons who viewed the sign, that was being attacked. If the concept of "fighting words" can be so broadly interpreted as to be applied here, then any expression with which an audience strongly disagrees constitutes "fighting words" susceptible of abridgement. Yet, that is precisely contrary to the decisions of this Court cited above, which are post-*Chaplinsky*. Finally, it should be noted that *Chaplinsky* itself has not well stood the test of time. Besides "fighting words" that decision also excluded from First Amendment protection "the lewd and obscene, the profane, the libelous . . . ." (315 U.S. at 572.) Yet is is now clear that "the libelous" to a very large extent is included within the scope of First Amendment protection. (*New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964).) But what of "the lewd and obscene" and "the profane"? It may be this factor (rather than the stated reason of possible violence) that *sub silentio* moved the Court of Appeal to affirm the conviction, and that caused the California Supreme Court to deny Appellant's petition for hearing while in *In re Bushman*, 1 Cal. 3d 767, 83 Cal. Rptr. 375 (1970), limiting the impact of Penal Code section 415 with respect to the issue of violence. We leave, then, the element of possible violence (which for reasons previously stated cannot constitutionally justify speech abridgement in the present case) and turn to the constitutional status of profanity, as distinguished from obscenity. As will be seen, too much has occurred since the casual dicta of *Chaplinsky* for the Court below to refer without differentiation to "the lewd and obscene" and the "profane."

**B. Appellant's Speech Was Not "Obscene," and Hence Cannot Be Excluded From First Amendment Protection on That Ground.**

In *Roth v. United States,* 354 U.S. 476, 77 S. Ct. 1304, L.Ed.2d 1498 (1957), this Court held that "obscene" expressions are outside the scope of First Amendment freedom of speech protection. Therefore, in order to avoid Appellant's claim of First Amendment protection, the trial court held, as a matter of law that the words "Fuck the Draft" are "obscene" within the constitutional meaning of that term (A. 20). In this the trial court was in error, in that its ruling is clearly contrary to this Court's constitutional definition of obscenity. One of the more recent expressions by this Court of that definition may be found in *A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney General of Massachusetts,* 383 U.S. 413, 86 S. Ct. 975, 16 L. Ed. 2d 1 (1966) (hereinafter cited as *Memoirs v. Massachusetts).* In that case this Court[2] held that in order for an expression to be held obscene,

> "three elements must coalesce: it must be established that (a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value." (*Memoirs v. Massachusetts, supra,* at 418.)

It is clear under the holding in *Memoirs* that unless *all three* elements are found to be applicable to a given expres-

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[2]More precisely, the passage above quoted is from an opinion written by Mr. Justice Brennan, and joined in by Mr. Chief Justice Warren and Mr. Justice Fortas. However, a majority of the members of this Court either accepted the definition of obscenity set forth above, or expressed a view that would entirely eliminate or even more narrowly circumscribe the obscenity exemption from First Amendment protection. See the concurrence by Mr. Justice Black and Mr. Justice Stewart, 383 U.S. 413, 421, and the separate concurring opinion by Mr. Justice Douglas, 383 U.S. 413, 424.

sion it may not be held to be obscene and thus without First Amendment protection. Therefore, Appellant's words "Fuck the Draft" may not be held "obscene" and thus denied First Amendment protection, if any one of the three elements is not applicable in the present case. But for reasons set forth below, it will be seen that in fact *none* of the three elements is applicable to the case at bar.

(1) *The Dominant Theme of Defendant's Expression, Taken as a Whole, Does Not Appeal to a Prurient Interest in Sex.*

It hardly requires scholarly erudition or citation of authority to establish the obvious fact that the phrase "Fuck the Draft" does not arouse sexual thoughts, nor appeal to a prurient interest in sex. It is true that in its origin the word "fuck" did have a sexual connotation, and currently one meaning of the word relates to sexual intercourse. But it is also true that there are other currently accepted meanings of the word which are without sexual content. For example, the *Dictionary of American Slang* (Wentworth & Flexner, editors) (Crowell, 1960) includes the following meanings:

> "To cheat, trick, take advantage of, deceive, or treat someone unfairly . . . . confusing; confused; disorganized. Wide W.W. II use."

But the dictionary definition[3] most in point is that by the *Dictionary of American Slang* for the phrase "fuck it": "An expression of dismay or annoyance." See also *Lara v. State*, 95 S.W. 1083 (1906). It is clear that the phrase "Fuck the Draft" was intended to express (A. 19-20) dismay and annoyance with the Selective Service System, gen-

[3] The Court of Appeal is in error when it states that the word "fuck" does not "appear in any standard dictionary" (A. 33). In addition to the definitions set forth above, see *The American Heritage Dictionary of the English Language* (Amer. Heritage Publishing Co. and Houghton Mifflin Co. 1969) which includes in its definition of "fuck . . . To deal with in an aggressive . . . manner" and "fucking . . . Damned. Used an as intensive . . . ."

erally known as "the draft." "Indeed, the word fuck is the most common expletive in our contemporary language to express violent hostility" (Rollo May, M.D., *Love and Will*, W. W. Norton & Co., 1969, p. 48). No one could possibly have believed that Appellant was suggesting sexual intercourse with the Selective Service System. (Compare this Court's recent recognition in *Greenbelt Cooperative Association v. Bresler*, ___ U.S. ___, 26 L. Ed. 2d 6, 90 S. Ct. 1537 (1970), of the several meanings of the word "blackmail" and its conclusion:

> "It is simply impossible to believe that a reader who reached the word 'blackmail' in either article would not have understood exactly what was meant: it was Bresler's public and wholly legal negotiating proposals that were being criticized. No reader could have thought that either the speakers at the meetings or the newspaper articles reporting their words were charging Bresler with the commission of a criminal offense." (26 L. Ed. 2d at 15, 90 S. Ct. at 1542.)

It is clear, then, beyond argument, that the expression used by the Appellant had no sexual connotation whatever, no less did it by its dominant theme appeal to a prurient interest in sex. (See *Keefe v. Geanakos*, 418 F.2d 359, 361 (1st Cir. 1969), in which it was held that an article containing the word "motherfucker" could not be read "in whole or in part, as an incitement to libidinous conduct, or even thoughts.") For this reason alone, under this Court's definition of obscenity, Appellant's expression was not obscene.

(2) *Since Appellant's Expression Does Not Relate to the Description or Representation of Sexual Matters, It Does Not Fall Under the Supreme Court's Patently Offensive Test.*

As indicated above, this Court has held that an expression may not be held obscene unless it is

> "patently offensive because it affronts contemporary community standards *relating to the description or representation of sexual matters.*" (*Memoirs v. Massachusetts, supra,* at 418, emphasis added.)

This Court may wish to take judicial notice of the fact that the mere use of the word "fuck" even when relating to sexual matters is no longer patently offensive as an affront to contemporary community standards, in view of the increasing prevalence of literary works of high quality and critical esteem which use this word in a sexual context. J. Donald Adams, former editor of the *New York Times Book* Review, in *The Magic and Mystery of Words,* Chapter VIII, entitled "Those Four-Letter Words," after explicitly discussing the word "fuck," observes that

> "in books today, in mounting fashion, the sky's the limit. All words, so far as propriety goes, now stand equal in the editor's sight." (Holt, Rinehart and Winston, 1963, pp. 72-73.)

(See the further discussion of this point at Argument II B (1)(d), *infra.*) However, judicial notice of the prevalent acceptance of the word "fuck" is unnecessary since even if the word is "patently offensive," as used by the Appellant it did not relate "to the description or representation of sexual matters" (see subparagraph (1), *supra*). Therefore, the "patently offensive" test formulated by this Court has not been satisfied, so that for this reason alone Appellant's expression may not be classified as "obscene."

(3) *Appellant's Expression Was Not Utterly Without Redeeming Social Value.*

This Court has held that there may not be a finding of obscenity unless the expression is "utterly without redeeming social value." (*Memoirs v. Massachusetts, supra,* at 418.) Thus, even if a work has only a "modicum of social value", as was the finding with respect to the work "Memoirs of a Woman of Pleasure" (better known as "Fanny Hill") in *Memoirs v. Massachusetts, supra,* p. 420, it still must be held not obscene, and "this is so even though the book is found to possess the requisite prurient appeal and to be patently offensive." (*Memoirs v. Massachusetts,* supra, at 419.) If expressions of nonpolitical content, such as "Fanny Hill," are held to have sufficient social value as to prohibit a finding of obscenity, how much clearer it is that expressions of a political point of view, as in the instant case, are not "utterly without redeeming social value."

It must follow, then, on each of the three separate and independent grounds enumerated above, that Appellant's expression was not obscene in the constitutional sense, and therefore the freedom of speech guarantees of the First and Fourteenth Amendments cannot be denied on this ground.

**C. There Are No Time, Place, or Manner "Non-Speech" Elements in This Case Which Justify Denying Appellant First Amendment Protection for His Speech.**

The Court of Appeal opinion implies that apart from possible violence there may have been a non-speech element justifying speech abridgment in the fact that

> "defendant's conduct consisted of marching through a public building with the premediated intent of attracting the attention of others to the message on his jacket.
>
> "The gravaman (*sic*) of the defendant's offense was his selection of the public corridors of the

> county courthouse as the place to parade. . . ." (A. 33)

This, in the first place, is a misreading of the facts. Appellant did not "select" the courthouse corridors as a place to "parade." Appellant was on his way to the courtroom of Division 20 (A. 18), and it was necessary en route to pass through said corridors. In any event this case cannot be assimilated to those cases which have justified abridgment of speech because the speaker had no right to speak at the particular place or time where the speech occurred. The leading case enunciating this principle is *Adderley v. Florida*, 385 U.S. 39, 47-48, 87 S. Ct. 242, 17 L. Ed. 2d 149 (1966), wherein demonstrators were held liable for trespass on the jailhouse grounds. This Court denied the

> "unarticulated premise . . . that people who want to propagandize protests or views have a constitutional right to do so whenever and however and wherever they please."

However, the Court in *Adderley* was careful to point out:

> "There is not a shred of evidence in this record that this power was exercised, or that its exercise was sanctioned by the lower courts, because the sheriff objected to *what was being sung or said* by the demonstrators . . . . The record reveals that he objected only to their presence on that part of the jail grounds reserved for jail uses." (385 U.S. at 47, emphasis added.)

This is to be contrasted with the present case where Appellant had every right to be where he was, his manner was neither loud (A. 19) nor unruly (A. 19), and the only objection was to what he said. Abridgement in such circumstances is because of a speech, not a non-speech, element. It is a non-speech element, justifying abridgment, only if it involves a "governmental interest . . . unrelated to the suppression of free expression . . . ." (*United States v. O'Brien*, 391 U.S. 367, 377, 88 S.Ct. 1673, 20 L.Ed.2d 672) (1968).) The objective here was precisely to suppress Appellant's expression, not his

was precisely to suppress Appellant's expression, not his physical presence.

## II

## THE FACT THAT POLITICAL SPEECH CONTAINS PROFANITY DOES NOT FOR THAT REASON DEPRIVE SUCH SPEECH OF FIRST AMENDMENT PROTECTION.

It is an unchallengeable fact of contemporary American life that young people are increasingly prone to express themselves, particularly in political discussions, through the use of "four-letter" words that older persons might not choose to employ. The present case is one of many in which the lower courts have responded to this phenomenon in a punitive manner. It is time, and urgently required, that this Court explicitly apply the First Amendment principles which it has so carefully evolved to this new commodity in the marketplace of ideas. A consistent application of First Amendment principles would not, of course, immunize any and all public use of profanity. When such use constitutes an immediate prelude and incitement to violent acts, the expression of profanity itself may be subject to punishment. That is not this case (see Argument I A, *supra*). When profanity is used as a part of an "obscene" work or expression, then, again, its use may be subject to punishment. But that, too, is not this case (see Argument I B, *supra*). Finally, any speech, whether it uses profanity or not, may be subject to abridgment if the time, place, or manner of its expression violate legitimate non-speech interests. Again, that is not this case (see Argument I C, *supra*).

What remains is profanity which is objectionable only because some persons may find its expression offensive. Does this justify subjecting Appellant (and many others like him) to 30 days in jail?

### A. The First Amendment is Equally Applicable to Offensive and Nonoffensive Speech.

The fact that some persons find a given expression offensive has never been regarded as justifying the abridgment of freedom of speech. Free speech "may indeed best serve its high purpose when it . . . stirs people to anger. Speech is often provocative and challenging. It may . . . have profound unsettling effects as it presses for acceptance of an idea."

*Terminiello v. Chicago*, 337 U.S. 1, 4, 69 S. Ct. 894, 93 L. Ed. 1131 (1949).

The freedom of speech "guarantee is not confined to the expression of ideas that are conventional or shared by a majority."

*Kingsley International Pictures Corp. v. Regents of the Univ. of N.Y.*, 360 U.S. 684, 689, 3 L. Ed. 2d 1512, 79 S. Ct. 1362 (1959).

> "It is firmly settled that under our Constitution the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers." (*Street v. New York*, 394 U.S. 576, 592, 22 L. Ed. 2d 572, 585, 89 S. S.Ct. 1354 (1969).)

Thus, this Court has held that under the First Amendment a motion picture may not be censored on the ground that it is "sacrilegious" (*Burstyn v. Wilson*, 343 U.S. 495, 72 S. Ct. 777, 96 L. Ed. 1098 (1952)), though to many this may be more offensive than profanity. And it hardly requires citation of authority to conclude that simply because the writings of Adolph Hitler or of Joseph Stalin are terribly offensive to many people, this does not justify a legal prohibition of such writings.

For a further exploration of just why the First and Fourteenth Amendment guarantees of free speech extend to profanity, that is, to so-called "four-letter" or "dirty" words,

we turn now to an analysis of the underlying rationale of freedom of speech, and its application to such words.

### B. Fundamental First Amendment Theory Requires Protection for Speech Such as that Employed by Appellant.

Mr. Justice Brandeis in his famous concurring opinion in *Whitney v. California*, 274 U.S. 357, 47 S. Ct. 641, 71 L. Ed. 1095 (1927), formulated a now classic statement of the reasons why free speech is protected from governmental interference. These are examined below, together with their application to the present case.

#### (1) *Free Speech as an Essential Element for a Self-Governing People.*

##### (a) The Nature of the Democratic Dialogue.

Brandeis in *Whitney* observed:

> "Those who won our independence believed . . . that freedom to think as you will and to speak as you think are indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; . . . that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government . . . . Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law - the argument of force in its worst form." (274 U.S. at 375-76.)

Essentially the same point was made by Alexander Meiklejohn in his famous work *Free Speech and Its Relation to Self-Government* (Harper & Bros., 1948), p. 25:

> "[For a self-governing people] the final aim . . . is the voting of wise decisions. The voters, therefore, must be made as wise as possible. The welfare of the community requires that those who decide issues shall understand them. They must know

> what they are voting about. And this, in turn, requires that, so far as time allows, all facts and interests relevant to the problem shall be fully and fairly presented. . . . Both facts and interests must be given in such a way that all alternative lines of action can be wisely measured in relation to one another. As the self-governing community seeks, by the method of voting, to gain wisdom in action, it can find it only in the minds of its individual citizens. If they fail, it fails. That is why freedom of discussion for those minds may not be abridged."

This Court recently summed up the point here made when it referred to ". . . the purpose of the First Amendment to preserve an uninhibited marketplace of ideas . . . [and to] the First Amendment goal of producing an informed public capable of conducting its own affairs . . ." (*Red Lion Broadcasting Co. v. F.C.C.*, 395 U.S. 367, 390, 392, 23 L. Ed. 2d 371, 389, 390, 89 S. Ct. 1794 (1969).)

**(b) The Indivisibility of Form and Substance in the Democratic Dialogue.**

Why, it may be asked, should the need for unfettered discussion extend even to the use of "dirty" four-letter words? Why would it not have been sufficient for the Appellant simply to have carried a sign reading: "I Hate the Draft"? Put more generally, the question is: does the First Amendment forbid distinguishing between the offensiveness of the idea conveyed and the offensiveness of the language employed to convey the idea? Clearly, the Constitution requires that a nonoffensive idea offensively expressed receive the same protection as an offensive idea. The form no less than the substance of speech must be granted First Amendment protection if the requirements of a meaningful democratic dialogue are to be preserved.

This is apparent on several different levels. First, and most immediately, if the Appellant had been forced to use the euphemistic "I Hate the Draft" instead of "Fuck the Draft," the self-governing community would in some degree

have been rendered ignorant of "all facts and interests relevant to the problem." The very fact that the Appellant chose to express his feelings about the draft through the use of a word that many would find shocking is an evidence of a depth of feeling (A. 19-20) which itself may be a significant factor as to which the self-governing community should take account. What conclusions the electorate might decide to draw from the evidence of such depth of feeling are beside the point. The conclusion might be that the penalties for draft evasion must be made more severe, or it might be that the draft should be repealed, or it might lead to any one of a number of other conclusions. The point is that unless the electorate is freely exposed to the depth of feeling by young men faced with the draft, any political decisions it makes will be made on the basis of incomplete data.[4] It would be a more pleasant world if some men were not impelled to express themselves in ways that others find offensive, but it would also be a dream world in which the self-governing community would be unable to make decisions based upon hard reality.

But there are also broader implications in the abridgment of freedom of speech that would result if the state were permitted to punish particular choices of language in the expression of ideas, even if it remained possible to express the same ideas in more acceptable language. The emotive content of language can be fully as important as its intellectual content in the competition of ideas for acceptance in the marketplace.[5] If the state has the power to censor

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[4] "Thus the voicing of a minority position is desirable even when stated with much error. 'Those who are unhappy have no need for anything in the world except people capable of giving them their attention.' Freedom increases the chances of attention. Thus it contributes indirectly to truth by hastening a sound decision on a public issue." Zechariah Chafee, Jr., *The Blessings of Liberty* (J. B. Lippincott Co., 1956), pp. 112.

[5] On the distinction between the emotive content and the intellectual (or symbolic) content of language see the classic work of Ogden and Richards, *The Meaning of Meaning* (Routledge & Kegan Paul,

emotive language it is thereby enabled in some meaningful degree to determine which ideas will in fact gain popular acceptance. The fact that the state or members of the public find certain forms of expression to be offensive cannot justify the inhibition of such forms, with the resulting distortion of a truly free competition in ideas. For example, many persons no doubt find most offensive such typical vulgar Marxian cliches as "blood-sucking imperialists," "fascist hyenas," "capitalist lackeys," etc. A state could not, however, consistent with the First and Fourteenth Amendments, forbid the use of such offensive terminology even though it were to permit publication of a scholarly Marxian treatise expounding the same ideas in more acceptable form. Fewer, or at least different, members of the public would tend to be influenced by nonemotive, more intellectualized speech. If the state could determine to which members of the public a given speech might appeal, it could in large measure determine which ideas would prevail in the marketplace. In the exposition of ideas form and substance are inextricably merged, so that neither may be abridged without an impermissible distortion of what is here referred to as the democratic dialogue.

For this reason the First Amendment forbids a state to require that dissenting views be expressed in a manner that the authorities regard as polite.

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10th ed. 1949), in which the authors state: "In ordinary everyday speech each phrase has not one but a number of functions. We [discuss here] a twofold division . . . the division between the *symbolic* use of words and the *emotive* use. The symbolic use of words is *statement;* the recording, the support, the organization and the communication of references. The emotive use of words is a more simple matter, it is the use of words to express or excite feelings or attitudes . . . This subtle interweaving of the two functions is the main reason why recognition of their difference is not universal" (pp. 149-50, emphasis supplied by the authors). See also Kenneth Burke, *Semantic and Poetic Meaning*, in The Philosophy of Literary Form (Vintage, 1957), p. 121.

> "[I]t is a prized American privilege to speak one's mind, *although not always with perfect good taste,* on all public institutions." (*Bridges v. California,* 314 U.S. 252, 270, 86 L. Ed. 192, 62 S. Ct. 190 (1941) (emphasis added).)
>
> "As Cooley pointed out long ago (Cooley, Thomas M., *Constitutional Limitations* (7th ed.), p. 613), you cannot limit free speech to polite criticism, because the greater the grievance the more likely men are to get excited about it, and the more urgent the need of hearing what they have to say." (Professor Zechariah Chafee, Jr., *Free Speech in the United States* (Harvard Univ. Press, 1941), p. 43).)

Attorney General John N. Mitchell, in a major policy speech recently affirmed the Justice Department's recognition that free speech extends to the form in which ideas are expressed. He said:

> "Given our times, we cannot expect political demonstrations to be conducted like prayer meetings. *We must expect language which may incite hostility or may be obscene.* This is because the First Amendment protects all of us, including men and women who choose to be unruly, unreasonable and impolite." (*Los Angeles Times,* July 4, 1970, Part I, p. 2, col. 4) (emphasis added).)

**(c) Profanity as an Indispensable Ingredient of the Democratic Dialogue.**

There is still a further consideration as to why the First Amendment must be held fully applicable to the word "fuck," at least in connection with political expression, as in the present case. As a language relies increasingly on given words, the suppression of such words represents an increasingly serious distortion of the democratic dialogue, and hence of the fundamental principles of free speech. This Court may surely take judicial notice of the fact that "today, many of the young (or would-be young) use . . . obscene language quite deliberately as shock weapons of protest against 'the Establishment.'" (*Time Magazine,* July

11, 1969, p. 61.) (See *Keefe v. Geanakos*, 418 F.2d 359, 361 (1st Cir. 1969), in which the court took judicial notice that the word "motherfucker" is used "by young radicals and protesters from coast to coast.") Four-letter words are, to a large extent, the current language of dissent. "Obscenity, in short, may be viewed as the counter-code to whatever orthodoxy prevails." (Renatus Hartogs, M.D., Ph.D. (with Hans Fantel), *Four-Letter Word Games* (M. Evans & Co., 1967), p. 20.) (Dr. Hartogs is Chief Psychiatrist of Youth House and the New York Detention House for Juvenile Delinquents and Medical Director of Community Guidance Service of New York City. This work is hereinafter cited as "Hartogs.") At a time when the alienation of young people is mounting, and when their loyalty to the democratic "system" is increasingly eroded, it is vital that this Court demonstrate that the right of free speech - including the speech which the young people choose to use - is a part of the "system," and that it is not to be equated with violent acts of dissent, which the "system" cannot and should not tolerate.

Moreover, the use of profanity as an integral part of the language of dissent is particularly observable among the poorer segments of the black community, and among other disadvantaged groups. "To the slum kid, obscenity is not an alien idiom. He is surrounded by it on his street, and even his parents may use four-letter words quite casually" (Hartogs, p. 50). The input of minority groups to the democratic dialogue is obviously vital if "the First Amendment goal of producing an informed public capable of conducting its own affairs" (*Red Lion Broadcasting Co. v. F.C.C., supra,* at 392) is to be realized. Yet, that input is greatly crippled if the very words which many minority group members find essential to the expression of their dissenting views are rendered legally taboo.

It is further to be noted that legal actions against persons for employing four-letter words are generally confined to those who use such words as a part of the language of dis-

sent. Though the use of the word "fuck" by policemen while on duty is notorious (see *e.g.* The Report of the National Commission on the Causes and Prevention of Violence, popularly known as "The Walker Report"), this generally is not complained of by those who take offense at the use of the word by those in dissent, and virtually never leads to prosecution or disciplining of the police. Though not speaking specifically of four-letter words, the following remarks of John Stuart Mill in his classic "On Liberty" are apposite:

> "Undoubtedly the manner of asserting an opinion, even though it be a true one, may be very objectionable, and may justly incur severe censure . . . . With regard to what is commonly meant by intemperate discussion, namely, invective, sarcasm, personality, and the like, the denunciation of these weapons would deserve more sympathy if it were ever proposed to interdict them equally to both sides; but it is only desired to restrain the employment of them against the prevailing opinion; against the unprevailing they may not only be used without general disapproval, but will be likely to obtain for him who uses them the praise of honest zeal and righteous indignation. Yet whatever mischief arises from their use, is greatest when they are employed against the comparatively defenseless; and whatever unfair advantage can be derived by any opinion from this mode of asserting it, accrues almost exclusively to received opinions . . . . [It is therefore] imperative that human beings should be free to form opinions, and to express their opinions without reserve . . . ." (J. S. Mill, On Liberty, *The Philosophy of John Stuart Mill*, (Mod. Lib. ed., 1961) pp. 246-48.)

**(d) Profanity as a Part of the Language of Contemporary Society.**

Finally, there is something ludicrous in sending the Appellant to jail for his use of a word that society tolerates and often rewards when used in the arts, and even in the mass-media. Seven out of the ten best-selling hard-cover works of fiction during the year 1969, including the first four, repeatedly used the word "fuck" (see Exhibit A, appended hereto). This is illustrative of the indisputable fact that numerous highly popular contemporary literary works contain the word. Motion pictures now also use the word. (The extremely popular "M*A*S*H" is but one such example.) And of course, numerous works using the word "fuck" have been judicially upheld (see Exhibit B, appended hereto).

Widespread use of the word "fuck" can, perhaps, be traced to World War II, when most, if not virtually all, of the members of the armed forces either used or heard the word constantly. Even then, polite society embraced the acronym SNAFU, though this was universally understood to stand for "situation normal - all fucked up" (see *Dictionary of American Slang*, Wentworth & Flexner, editors (Crowell, 1960), p. 493). Since that time the word "fuck" has attained an acceptance not only among young people, but also among many other segments of the population. Just as in 1939 Clark Gable's use of the word "damn" in the motion picture "Gone With the Wind" caused an uproar in some segments of society (Hartogs, p. 22), so the word "fuck" today is found offensive by many persons. But the fact remains that "the word 'fuck,' long a commonplace in youthful vocabularies . . ." (U.C.L.A. *Daily Bruin*, November 20, 1968, p. 1), is increasingly accepted by many diverse segments of our society. The demands of a meaningful democratic dialogue are surely frustrated if because one segment of society finds given language to be offensive this constitutes legal grounds for prohibiting other segments of society from using such language when they find it to be the most expressive means of conveying given ideas.

**(e) First Amendment and Privacy Rights of Unwilling Participants in the Democratic Dialogue.**

Given the situation that a substantial segment of society finds the use of the word "fuck" to be offensive, while another substantial segment of society not only finds it nonoffensive but also a useful and expressive term, the question is posed as to whether the offended segment can prevent the other segment from using the word in any situation where those who may be offended are likely to encounter the word's use.

It should first be noted that reference to the "shock" effect of profanity adds nothing analytically to the problem. This is but another way of stating that use of such language may be highly offensive, and it has already been demonstrated that offensiveness *per se* does not vitiate First Amendment rights (see Argument II A, *supra*). Many who are not in the least shocked by reading the best-selling works of fiction enumerated in Exhibit A might be terribly shocked (that is to say, highly offended) if they were to read or hear antisemitic statements such as "Zionism is Treason" and "Communism is Jewish." Yet such statements, even if by persons in a picket line in front of a meeting celebrating the independence of Israel, are clearly protected speech. See *People v. Huss*, 241 Cal. App. 2d 361, 51 Cal. Rptr. 56 (1966). (Note that the very Division of the California Court of Appeal that rendered the opinion below in the present case also decided the *Huss* case.)

But, may it be argued that inability of members of the public to avoid being exposed to material which they regard as shocking or offensive (for whatever reason) justifies abridgment of speech of those who would punish such material? This Court has in the past suggested some such limitation in certain circumstances when it spoke of "an assault upon individual privacy by publication in a manner so obtrusive as to make it impossible for an unwilling individual to avoid exposure to it." (*Redrup v. New York*, 386 U.S. 767, 769, 18 L. Ed. 2d 515, 517, 87 S. Ct. 1414

(1967) (dictum).) While it is not at all clear that this Court would recognize any such "captive audience" doctrine (see *Public Utilities Commission v. Pollak*, 343 U.S. 451, 96 L. Ed. 1068, 72 S. Ct. 813 (1952)), if any such limitation upon First Amendment rights were to be accorded recognition, it is vital that it be restricted in such manner that the integrity of the marketplace of ideas, what is here referred to as the democratic dialogue, not be undermined.

The clearest area for permitting the concept of audience privacy (inherent in any "captive audience" doctrine) to prevail over a speaker's First Amendment rights is in the privacy of the home. It is here that the recognition of privacy is most compelling, and the demands of the democratic dialogue least urgent. (Even here, however, a distinction may be drawn between commercial and noncommercial speech. Compare *Martin v. Struthers*, 319 U.S. 141, 87 L. Ed. 1313, 63 S. Ct. 862 (1943), and *Breard v. Alexandria*, 341 U.S. 622, 95 L. Ed. 1233, 71 S. Ct. 920 (1951)). Once outside the confines of the home, to hold, as unsuccessfully argued in *Public Utilities Commission v. Pollak*, *supra*, "that the First Amendment guarantees a freedom to listen only to such points of view as the listener wishes to hear" would carry the gravest dangers for the viability of the democratic dialogue. As Mr. Chief Justice Burger, speaking for this Court, recently recognized: ". . . we are often 'captives' outside the sanctuary of the home and subject to objectionable speech and other sound . . . ." (*Rowan v. United States Post Office Department*, 397 U.S. 728, 738, 25 L. Ed. 2d 736, 744, 90 S. Ct. 1484, 1491 (1970)). This is as it must be if the right of free speech is not to be reduced to a meaningless charade. If persons who do not wish to hear speech which they think they may oppose to to the point of finding it highly offensive were to be insulated by law from any such speech, then freedom of speech would amount to little more than the right to address audiences who already agree with the speaker. In that event commerce in the marketplace of ideas would be frozen, and the democratic dialogue silenced.

The recent case of *Keefe v. Geanakos*, 418 F.2d 359 (1st Cir. 1969), is instructive in this regard. Plaintiff, the head of an English department and part-time instructor in the Massachusetts public school system, gave to each member of his senior English class a copy of the September, 1969, issue of *Atlantic Magazine*, which carried an article in which was contained the phrase: "Up against the wall, motherfucker." As a result, plaintiff was subjected to dismissal charges by the school authorities. He unsuccessfully sought from the federal District Court an injunction pendente lite. The Court of Appeals thereafter reversed the order of the District Court, which had denied an interlocutory injunction pending appeal. Here, then, was a "captive audience" of students in a class, and the court posed the question of "whether the shock [of reading the word 'motherfucker'] is too great for high school seniors to stand." The Court responded: "If the answer were that the students must be protected from such exposure we would fear for their future. We do not question the good faith of the defendants in believing that some parents have been offended. With the greatest of respect to such parents, their sensibilities are not the full measure of what is proper education" (418 F.2d at 361-62). In *Keefe* the word in question was, if anything, more shocking than that used by Appellant, and the audience was exclusively children, yet the court found no occasion to invoke a "captive audience" doctrine.

But even if outside the home a "captive audience" rule might sometimes be applied where the audience is truly "captive" in the sense that they have no choice but to listen or view unwanted speech for extended periods, this is certainly not such a case. Appellant was observed in the courthouse corridor (A. 18), and he then entered the courtroom of Division 20 (A. 18). Persons within the courtroom may, in a sense, have constituted a captive audience, but while in the courtroom Appellant removed his jacket and held it folded over his arm (A. 18). Thus persons within the courtroom not only were not required, but were unable, to view the writing on Appellant's jacket. No more than a

momentary glance at such writing was required of persons who may have observed Appellant in the corridor as he made his way to Division 20. If such a casual and fleeting reception of unwanted speech were enough to trigger a "captive audience" doctrine such as to vitiate First Amendment rights, then little remains of the marketplace of ideas and the democratic dialogue. As one makes his way through a public park where speakers in Hyde Park style market their diverse ideas, it is inevitable that one will hear fragments of speech espousing doctrine that many will find terribly offensive. But no one is required to pause and listen to an entire speech. Surely a casual and fleeting exposure to a few offensive lines does not render the hearer a member of a "captive audience." Even in the privacy of one's home the radio or television may carry a speaker whose doctrine is regarded as very offensive to some. The fact that a minimal effort is required to immediately "switch off" the unwelcome speaker surely does not render the radio and television audience "captives." In sum, if fleeting exposure to unwelcome speech deprives Appellant of his First Amendment rights, then the same principle would be applicable to street-corner speakers, and even to radio and television programs, and the central core would be cut out of a First Amendment doctrine. (See *Cantwell v. Connecticut*, 310 U.S. 296, 309, 84 L. Ed. 1213, 1220, 60 S. Ct. 900 (1940), wherein defendant's right to speak upon a public street was upheld, although his speech against organized religion and particularly against the Roman Catholic Church "highly offended" persons who heard him.)

(2) *Free Speech as a Function of Self-Fulfillment.*

Besides discussing speech as a function of democracy, Brandeis in *Whitney* also observed:

> "Those who won our independence believed that the final end of the state was to make men free to develop their faculties . . . . They valued liberty both as an end and as a means. They believed lib-

> erty to be the secret of happiness and courage to be the secret of liberty." (274 U.S. at 375).

That is, free speech is important not only as a means in the democratic process but also as an end in itself. The nature of man is such that he can realize self-fulfillment only if he is free to express himself. Again one may ask but why is it necessary to find such self-fulfillment through the use of "dirty" words that offend others. For most of us there is no felt need frequently to resort to such words. But probably very few persons never feel called upon to occasionally express themselves through the use of words that are not acceptable in polite society.

> "Among males, it is, I believe, the rarest exception who does not use the word [fuck] occasionally." (Leo Stone, M.D., *On the Principal Obscene Word of the English Language*, 35 International Journal of Psycho-Analysis, 30, 50 (1954).)

As J. Donald Adams, former editor of the *New York Times Book Review* observed in *The Magic and Mystery of Words* (Holt, Rinehart and Winston, 1963), p. 68:

> "There are things to be said in favor of even the coarsest of the four-letter words. They are forthright and vigorous, and for that reason preferable to the more ponderous and . . . polite usage . . . ."

The self-fulfilling function of four-letter words finds validation on the psychological as well as the literary level. The well-known psychiatrist, Dr. Renatus Hartogs, has said that the use of such words "provides a socially acceptable projection surface for repressed motives and instinctual needs" (Hartogs, p. 14). Another authority in the field of psychiatry has observed that the use of such words can result in "a mitigation of guilt feeling" (Edmund Bergler, *Obscene Words*, 5 Psychoanalytic Quarterly 226, 246 (1936)). Indeed, among some psychiatrists and psychologists it is thought to be "therapeutic" to use four-letter words in sessions of psycho-analysis (see Rollo May, *Love and Will* (W. W. Norton & Co., 1969), p. 47).

In some persons the need for the self-fulfillment that is achieved through the use of four-letter words is greater than in others. Many members of the younger generation appear to regard the use of such language as a necessary means of expressing certain values which are of great importance to them. Alexander Sesonske, Professor of Philosophy at the University of California, Santa Barbara, in speaking of the Berkeley Filthy Speech Movement, states:

> "They claimed the right to *be* frank, open, uninhibited non-conformists, avant garde, honest and free from hypocrisy - the sort of persons who use four-letter words freely in public. That such speech habits might also (or perhaps instead) be constitutive of persons who are licentious, inconsiderate, disrespectful and ill-bred apparently did not bother the Filthy Speech group." (Sesonske, *Saying, Being and Freedom of Speech,* 1 Philosophy and Rhetoric 25, 35 (1968).)

Most of us would not find self-fulfillment in such extreme use of four-letter words, but it cannot be denied that it serves this function for a considerable number of persons.

(3) *Freedom of Speech as a Safety Valve.*

> Finally Brandeis in *Whitney* observed that "order cannot be secured through fear of punishment for its infraction; that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones." (274 U.S. at 375.)

Thus a third separate function of free speech is as a safety valve. Men will be less inclined to resort to violence to achieve given ends if they are free to express themselves in such words as they may choose in advocating such ends.

Brandeis's insight as to the cathartic effect of speech has been confirmed by psychological studies. See Seymour Feshbach, *The Function of Aggression and the Regulation of Aggressive Drive*, 71 Psychological Review 257 (1964); John W. Thibaut and John Coules, *The Role of Communication in the Reduction of Interpersonal Hostility*, 47 Journal of Abnormal and Social Psychology 770 (1952). Indeed, one authority has speculated on the possibility that "legal authorities might be advised to provoke expressions of overt hostility in potentially dangerous mobs in situations in which this hostility can be controlled safely in order to prevent later outbursts when the controlling situations are inadequate." (Leonard Berkowitz, *Some Factors Affecting the Reduction of Overt Hostility*, 60 Journal of Abnormal and Social Psychology 14 (1960).) In any event, it seems clear that at least in some instances the use of four-letter words "releases repressed urges that might otherwise become extremely dangerous and destructive" (Hartogs, p. 78).

Society can far better bear the occasional annoyance of a sign such as that exhibited by Appellant than it can the alternative acts of violence (such as the bombing of draft boards and other institutions, and attacks on the Pentagon) as a way of expressing opposition to the draft. To the extent that we abridge the right of completely free verbal dissent for everyone we increase the likelihood that such dissent will be channeled into other, more dangerous, forms.

## III

### SECTION 415, AS CONSTRUED BY THE CALIFORNIA COURTS, IS UNCONSTITUTIONALLY OVERBROAD AND VAGUE.

Even if the use of the words "Fuck the Draft" could be punished under a properly drawn statute, Appellant's conviction must nevertheless be reversed because the statute under which he was convicted is invalid as it is both unconstitutionally vague and overbroad.

To Appellant's argument in this regard, the Court of Appeal responded by purporting to narrow the statute in such manner that speech may constitute "offensive conduct" only if it "incites violence or has a tendency to incite others to violence or a breach of the peace" (A. 31). This, it is said,

> "makes clear for triers of fact the nature of the forbidden conduct, and eliminates prosecutions or convictions for conduct which is merely offensive." (A. 31.)

We have already discussed in Argument I A (1) why this standard is constitutionally impermissible. Under the Court of Appeal's construction of section 415, not only profanity but any words may be punished if there is a mere possibility that others might object to the words to the extent of making a violent response. This constitutionally impermissible standard is not limited to profanity. Who is to say which words others *might* find so objectionable as to respond violently? A criminal statute must be written so as to give clear warning as to what conduct is proscribed. This doctrine was recently invoked in *In re Davis*, 242 Cal. App. 2d 645, 51 Cal. Rptr. 702 (1966), wherein that portion of California Penal Code section 650½ making it a crime "to commit any act which openly outrages public decency" was held unconstitutional on the ground of its vagueness. The Court there stated (at 664-65):

> "We have a statute which may truly mean all things to all men, for if it be said that public decency should not be defined by the standards of the most profligate segment of the community, neither could we accept the definitions of the most prudish. We have a statute which gives the executive almost unlimited power to harass those with whose conduct or morals it is at odds or whom it suspects of having committed other crimes which cannot be proven."

If words alone, unrelated to actual or threatened violence, may constitute "offensive conduct" within the meaning of

section 415, then manifestly here too we have a statute "which may truly mean all things to all men." Here is vagueness in its most rampant form. Indeed, the California court long ago recognized the validity of this point in connection with a San Francisco breach-of-the-peace ordinance which punished the use of "any words . . . having a tendency to create a breach of the peace." In *Ex parte Kearny*, 55 Cal. 212, 222 (1880), referring to this ordinance, that court held that the complaint charged no offense, and stated:

> "We shall not inquire, in this place, how it accords with constitutional law . . . . to place the power in the hands of a judge or jury to decide that 'any words' - to others, perhaps, apparently innocent - which they may think objectionable, have a tendency to create a breach of the peace. *That the language charged in the particular instance now before us was not only indecorous, but in the highest degree indecent, cannot affect the question.* The next conviction may be for the use of words less offensive, and the attempted definition of the crime sought to be created by the ordinance is so uncertain, as would leave it to the varied judgments or tastes of successive juries to find defendants guilty or not guilty of a crime for the use of exactly the same language." (Emphasis added.)

Related to, but distinguishable from, the defect of vagueness is that of overbreadth. Even if a statute which limited punishment to the public use of profanity would be constitutionally proper, such punishment may not be invoked under a statute which purports to punish any words which others might find offensive. This involves the defect of overbreadth wherein a single statute encompasses both valid and invalid restrictions on free speech. This Court has repeatedly held that a conviction may not stand under an overbroad statute even if the particular conduct in issue could have been properly punished under a narrowly drawn statute.

> "Because of the sensitive nature of constitutionally protected expression, we have not required that all of those subject to overbroad regulations risk prosecution to test their rights. For free expression - of transcendent value to all society, and not merely to those exercising their rights - might be the loser. [Citation.] For example, we have consistently allowed attacks on overly broad statutes with no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute with the requisite narrow specificity." (*Dombrowski v. Pfister*, 380 U.S. 479, 486, 14 L. Ed. 2d 22, 28 (1965).) (See also *N.A.A.C.P. v. Button*, 371 U.S. 415, 432-33, 9 L. Ed. 2d 405, 418 (1963).)

What this Court said with respect to the breach-of-the-peace statute in *Cox v. Louisiana, supra,* is equally applicable here: ". . . the conviction under this statute is unconstitutional in that it sweeps within its broad scope activities that are constitutionally protected free speech and assembly" (379 U.S. at 552, 13 L. Ed. 2d at 482-83).

Nor does the construction of section 415 placed upon it by the California Supreme Court in *In re Bushman*, 1 Cal. 3d 767, 83 Cal. Rptr. 375 (1970), save it from the defects of overbreadth and vagueness. In the first place, the opinion in *Bushman* is ambiguous on whether the standard is that the words "tend to incite others to violence" (1 Cal. 3d at 773; 83 Cal. Rptr at 378) or that they create "a clear and present danger that others will engage in violence . . . ." (1 Cal. 3d at 773; 83 Cal. Rptr. at 379). If the former standard is applicable then the statute is clearly overbroad for reasons advanced in Argument I A (1) *supra*. Even if the "clear and present danger" standard is applied, the statute is still impermissibly overbroad in that it would permit silencing a speaker simply because his audience opposes his speech to the point of willingness to engage in violent conduct in order to stop the speaker. The reasons why this is constitutionally impermissible are set forth at Argument I

A (2), *supra*. Finally, the fact that the California Supreme Court denied a hearing in the present case (A. 36) suggests that it would not apply the construction of *Bushman* to the language of profanity or so-called "shock" words. This in itself renders the statute unconstitutionally vague, since who is to say what words fall into this category? Are such words as "damn" and "screw" to be included in the class of proscribed words? If all words that anyone may regard as constituting profanity may be denied First Amendment protection, then the category is surely defective as over-broad. If something less than such a broad category is intended, then the statute is defective for vagueness.

## CONCLUSION

The judgment should be reversed.

Respectfully submitted,

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## EXHIBIT A

The following works constituted, in the order indicated, the ten best-selling hard-cover works of fiction for the year 1969, as reported by *Publisher's Weekly*, February 9, 1970, p. 40.

| Title | Pages on Which the Word "Fuck" Appears* |
|---|---|
| 1. PORTNOY'S COMPLAINT by Philip Roth | 85, 102, 106, 112, 117, 121, 124, 125, 129, 131, 134, 138, 140, 141, 142, 153, 159, 160, 161, 175, 177, 182, 195, 196, 197, 198, 211, 212, 224, 231, 233, 235, 265, 267, 270 (Random House edition) |
| 2. THE GODFATHER by Mario Puzo | 68, 134, 265 (Fawcett edition) |
| 3. THE LOVE MACHINE by Jacqueline Susann | 33, 144, 179 (Bantam edition) |
| 4. THE INHERITORS by Harold Robbins | 5, 9, 14 (Trident Press edition) |
| 5. THE ANDROMEDA STRAIN by Michael Crichton | ---- |
| 6. THE SEVEN MINUTES by Irving Wallace | 125, 127, 129 (Simon & Schuster edition) |
| 7. NAKED CAME THE STRANGER by Penelope Ashe | 31, 37, 64 (Dell edition) |
| 8. THE PROMISE by Chaim Potok | ---- |

*Except in the case of PORTNOY'S COMPLAINT, page citations are merely illustrative and not exhaustive.

| | | |
|---|---|---|
| 9. | THE PRETENDERS by Gwen Davis | 13, 72, 104 (Signet edition) |
| 10. | THE HOUSE ON THE STRAND by Daphne du Maurier | ---- |

The number one best-selling nonfiction work for 1969, as reported by *Publisher's Weekly, supra*, THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE, also contains the word "fuck." See Argument I B (1), *supra*.

## EXHIBIT B

The following works, each of which contains the word "fuck," have been judicially upheld:

TROPIC OF CANCER by Henry Miller:

*Grove Press, Inc. v. Gerstein*, 378 U.S. 577, 12 L. Ed. 2d 1035, 84 S. Ct. 1909 (1964)

*Zeitlin v. Arnebergh*, 59 Cal. 2d 901, 31 Cal. Rptr. 800 (1963)

*Attorney General v. A. Book Named "Tropic of Cancer,"* 345 Mass. 11, 184 N.E. 2d 328 (1962)

*McCauley v. Tropic of Cancer*, 20 Wisc. 2d 134, 121 N.W. 2d 545 (1963)

LADY CHATTERLEY'S LOVER by D. H. Lawrence:

*Grove Press v. Christenberry*, 276 F.2d 433 (2d Cir. 1960)

ULYSSES by James Joyce:

*United States v. One Book Entitled Ulysses*, 5 F. Supp. 182 (S.D. N.Y. 1933), aff'd 72 F.2d 705 (2d Cir. 1934)

NAKED LUNCH by William Burroughs:

*Attorney General v. A. Book Named "Naked Lunch,"* 351 Mass. 298, 218 N.E. 2d 571 (1966)

THE CARPETBAGGERS by Harold Robbins:

*People v. Pocket Books, Inc.*, 38 Misc. 2d 1004, 239 N.Y.S. 2d 631 (1963) (indictment insufficient)

CANDY by Terry Southern and Mason Hoffenberg:

*Commonwealth v. Dell Pub., Inc.*, 427 Pa. 189, 233 A. 2d 840 (1967)

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IN THE

# Supreme Court of the United States

October Term, 1970
No. 299

PAUL ROBERT COHEN,

*Appellant,*

*vs.*

THE STATE OF CALIFORNIA,

*Appellee.*

**Appeal From the Court of Appeal of California, Second Appellate District.**

## BRIEF OF APPELLEE.

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IN THE

# Supreme Court of the United States

October Term, 1970
No. 299

PAUL ROBERT COHEN,

*Appellant,*

*vs.*

THE STATE OF CALIFORNIA,

*Appellee.*

**Appeal From the Court of Appeal of California, Second Appellate District.**

## BRIEF OF APPELLEE.

### OPINIONS BELOW.

The Los Angeles Municipal Court did not issue a formal opinion when the appellant was "adjudged guilty as charged" on September 27, 1968 (A. 8). The Appellate Department of the Los Angeles Superior Court reversed the conviction on January 20, 1969 with a written unpublished opinion (A. 10-11). Upon rehearing, the Appellate Department of the Los Angeles Superior Court on May 23, 1969 again reversed the conviction with a written unpublished opinion (A. 13-17). The California Court of Appeal affirmed the judgment of conviction on October 22, 1969 with a written published opinion (A. 26-35) reported at 1 Cal. App. 3d 94, 81 Cal. Rptr. 503.

## JURISDICTION.

Appellant invokes jurisdiction of this Court under Title 28, United States Code Section 1257(2). On June 22, 1970 this Court postponed the question of jurisdiction to a hearing on the merits.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

The constitutional provisions involved are the First and Fourteenth Amendments of the United States Constitution.

The statutory provision involved is California Penal Code Section 415.

## STATEMENT OF THE CASE.

Appellant was charged in a verified complaint filed in the Municipal Court of the Los Angeles Judicial District, with having violated California Penal Code Section 415. The complaint alleged that on April 26, 1968 the appellant "did wilfully and unlawfully and maliciously disturb the peace and quiet of the neighborhood of 110 North Grand and the peace and quiet of . . . persons then and there being present, by then and there, engaging in tumultuous and offensive conduct." (A. 1).

Appellant was duly arraigned and informed of the charge against him, whereupon he pleaded not guilty (A. 4). On September 27, 1968 the appellant waived his right to a jury trial (A. 6). The prosecution's case was presented as follows:

On April 26, 1968 the appellant was observed in the corridor of the Los Angeles County Courthouse outside of Division 20 of the Los Angeles Municipal

Court. The appellant was wearing a jacket bearing the words "Fuck the Draft." There were women and children present in the corridor. The appellant entered the courtroom where he removed the jacket and held it folded over his arm. When the appellant left the courtroom, he was placed under arrest. Though he had not written the words, the appellant was aware that the words "Fuck the Draft" were on his jacket. The appellant stated that by wearing the jacket the public was made aware of the depth of feeling against the draft shared by the appellant and his friends (A. 18-20).

The appellant was adjudged guilty as charged. He was sentenced to 30 days in the Los Angeles County Jail (A. 8).

An appeal was taken to the Appellate Department of the Los Angeles Superior Court. That court reversed the conviction on January 20, 1969 (A. 10-11). On petition of appellee the case was granted a rehearing (A. 12). The Appellate Department for a second time reversed the conviction on May 23, 1969 (A. 13-17). On petition of appellee the case was certified to the California Court of Appeal (A. 23-25). The Court of Appeal affirmed the conviction with a published opinion on October 22, 1969 (A. 26-35). Appellant's petition for hearing was denied by the California Supreme Court on December 17, 1969 (A. 36).

On February 20, 1969 the appellant filed a Notice of Appeal to the United States Supreme Court in the California Court of Appeal.

On June 22, 1970 this Court postponed consideration of the question of jurisdiction to the hearing of the case on the merits (A. 37).

## ISSUES PRESENTED.

(1) The Court Lacks Jurisdiction to Review This Case.

(2) California Penal Code Section 415 is Constitutional

(3) Appellant's Conviction is not a violation of the First and Fourteenth Amendments.

## I.

### The Court Lacks Jurisdiction to Review This Case.

Appellant attempts to invoke the jurisdiction of this Court under Title 28 United States Code, Section 1257-(2). On June 22, 1970 this Court postponed the question of jurisdiction to the hearing of the case on the merits.

Appellee contends that this Court lacks jurisdiction in this case in that the basic issue considered by the California courts was the interpretation of the phrase "tumultuous or offensive conduct" contained in California Penal Code Section 415. This phrase was construed by the California Court of Appeal in a factual context.

The United States Supreme Court from the time of its inception has adhered to the principle that it will not review judgments of state courts which rest upon adequate and independent state grounds or nonfederal grounds. This Court is without jurisdiction to review holdings of the state courts, which concern matters of state law and amount at most to alleged erroneous construction of statutes of a state by its own courts [*Neblett v. Carpenter* (1938) 305 U.S. 297, 302, 83 L. Ed. 182, 187].

California Penal Code Section 415 contains the disjunctive phrase "tumultuous *or* offensive conduct." In conformity with California law (See: *People v. Ah Woo,* (1865) 28 Cal. 205, 212; *People v. O'Brien,* (1900) 130 Cal. 1, 3-4, 62 Pac. 297), the complaint herein, pleaded in the conjunctive so as to avoid uncertainty, alleged that the appellant engaged in "tumultuous *and* offensive conduct." (A. 1). The appellant was "adjudged guilty as charged." (A. 8). Merely because the complaint is phrased in the conjunctive does not prevent a trier of fact from convicting a defendant if the evidence proves only one of the alleged acts [*People v. McClennegen,* (1925) 195 Cal. 445, 452, 234 Pac. 91; *In re Bushman,* (1970) 1 Cal. 3d 767, 775, 83 Cal. Rptr. 375, 463 P. 2d 727].

In reversing the conviction, the Appellate Department of the Los Angeles Superior Court declared (A. 16):

> "It is our opinion that the Legislature did not intend to punish as distributing the peace 'offensive' conduct that was quiet and peaceful, but only that which was 'tumultuous'. Accordingly, we hold that the prohibition against engaging in 'tumultuous or offensive conduct' should be construed to read 'tumultuous *and* offensive conduct'."

The Appellate Department of the Los Angeles Superior Court certified the case to the California Court of Appeal because it appeared necessary to settle an important question of California law (A. 23).

In affirming appellant's conviction, the California Court of Appeal set forth the "Question Presented" to it: "Is offensive conduct which is not also tumultuous

punishable under Penal Code Section 415?" (A. 27). The Court of Appeal "by applying the law to the facts" determined this factual question adverse to appellant (A. 28).

The California Court of Appeal concluded that appellant's "acts constituted the type of offensive conduct prohibited by Section 415 in that it had a tendency to incite others to violent behavior or to disturb the peace." (A. 29). A similar construction of the statute was rendered by the California Supreme Court in *In re Bushman*, (1970) 1 Cal. 3d 767, 83 Cal. Rptr, 375, 463 P. 2d 727. It is a basic constitutional principle that construction of state laws is the exclusive responsibility of the state courts [*Speiser v. Randall*, (1958) 357 U.S. 513, 523, 2 L. Ed. 2d 1460, 1471].

The construction of a state statute by the highest court of the state fixes its meaning for the determination of its constitutionality by this Court, as if it had been amended by the California legislature [*Cramp v. Board of Public Instruction*, (1961) 368 U.S. 278, 285, 7 L. Ed. 2d 285, 291]. This Court must accept the California judicial construction of the statute [*Shuttelesworth v. Birmingham*, (1965) 382 U.S. 87, 91, 15 L. Ed. 2d 176, 180].

The California court has made a factual determination that appellant's conduct falls within the purview of California Penal Code Section 415. This Court is bound by a state's interpretation of its own statute. This Court may not substitute its judgment for that of the state when it becomes necessary to analyze the evidence for the purpose of determining whether it supports the findings of a state court. [*Garner v. Louisiana*, (1961) 368 U.S. 157, 166, 7 L. Ed. 2d 207,

215]. In reviewing a state conviction, issues of fact are for conclusive determination by the state courts and are not open for reconsideration by this Court. [*Watts v. Indiana,* (1949) 338 U.S. 49, 51, 93 L. Ed. 1801, 1804].

The California Court in construing the statute "found that the evidence was sufficient to support a conviction for disturbing the peace by means of offensive conduct as prohibited by Section 415 of the Penal Code." (A. 34). Clearly this was a *factual* determination as to the scope of California Penal Code Section 415.

The Appellant is asking this Court to review the California Court holding which concerns matters of California law. Appellant's arguments amount at most to an attack on the factual issues determined by the court and/or to an alleged erroneous construction of a California statute by its own courts. This Court is without jurisdiction to review these arguments.

Appellee contends that there was no substantial federal question involved, nor was a decision on a federal question necessary to the determination of the case by the California court.

## II

## California Penal Code Section 415 Is Constitutional.

> "Every person who maliciously and wilfully disturbs the peace or quiet of any neighborhood or person by loud or unusual noise, or *by tumultuous or offensive conduct,* or threatening, traducing, quarreling, challenging to fight, or fighting, or who, on the public streets of any unincorporated town, or upon the public highways in

such unincorporated town, run any horse race, either for a wager or for amusement, or fire any gun or pistol in such unincorporated town, or use any vulgar, profane, or indecent language within the presence or hearing of women and children, in a loud and boisterous manner, is guilty of a misdemeanor, and upon conviction by any Court of competent jurisdiction shall be punished by fine not exceeding two hundred dollars, or by imprisonment in the County Jail for not more than ninety days, or by both fine and imprisonment, or either, at the discretion of the Court." California Penal Code Section 415.

The appellant was convicted of a disturbance of the peace in that he engaged in "offensive conduct". On January 27, 1970 the California Supreme Court in the case of *In re Bushman,* 1 Cal. 3d 767, 83 Cal. Rptr. 375, 463 P. 2d 727 reviewed the "tumultuous or offensive" conduct phrase of California Penal Code Section 415.

The California Supreme Court in *Bushman,* page 773, declared:

"Section 415 is not unconstitutionally vague and overbroad. It has a commonly understood meaning that not only affords adequate notice of the type of conduct that is proscribed, but also precludes its application to conduct protected by the First Amendment. The part of the section under which [*Bushman*] was convicted provides: 'Every person who maliciously and wilfully disturbs the peace or quiet of any . . . person . . . by tumultuous or offensive conduct . . . is guilty of a misdemeanor.' The terms 'disturb the peace'

and 'breach of the peace', which are substantially synonymous, have long been understood to mean disruption of public order by acts that are themselves violent or that tend to incite others to violence. Thus, one may be guilty of disturbing the peace within that part of Section 415 if he engages in 'tumultuous' conduct, i.e., violent conduct that wilfully and maliciously endangers public safety or order. *He may also be guilty of disturbing the peace through 'offensive' conduct if by his actions he wilfully and maliciously incites others to violence or engages in conduct likely to incite others to violence.* [*People v. Cohen* (1969) 1 Cal. App. 3d 94, 101 (81 Cal. Rptr. 503).]" (Emphasis supplied).

The California Supreme Court continued:

"The foregoing construction of Section 415 assures that conduct protected by the First Amendment's guarantee of freedom of speech is not made criminal. Unlike the city ordinance considered by the United States Supreme Court in *Terminiello v. Chicago* (1948) 337 J.S. 1 [93 L. Ed. 1131, 69 S.Ct. 894], that permitted conviction if one's speech 'stirred people to anger, invited public dispute, or brought about a condition of unrest' (337 U.S. 1, 5 [93 L.Ed. 1131, 1135, 69 S.Ct. 894]), or the statute considered by the court in *Cantwell v. Connecticut* (1939) 310 U.S. 296 [84 L. Ed. 1213, 60 S.Ct. 900, 128 A.L.R. 1352], that permitted conviction although there was no clear and present danger to public peace and order, that part of Penal Code Section 415 in question here makes punishable only wilful and mali-

cious conduct that is violent and endangers public safety and order or that creates a clear and present danger that others will engage in violence of that nature."

Appellee contends that the conduct of appellant was "offensive" as that term has been interpreted by the California courts. Any act or conduct which disturbs the peace and quiet by inciting violence or which tends to provoke others to break the peace constitutes disturbance of the peace [*People v. Anderson*, (1931) 117 Cal. App. Supp. 763, 767, 1 P. 2d 64]. It is not necessary that any act have in itself any element of violence in order to constitute a breach of peace [*People v. Green*, (1965) 234 Cal. App. 2d Supp. 871, 873, 44 Cal. Rptr. 438; certiorari denied (1966) 382 U.S. 983, 15 L. Ed. 2d 480].

In *Cohen* (A. 28-29) the court declared that "if it can be reasonably anticipated that certain conduct will cause others to disturb the peace, wilfully and maliciously engaging in such behavior constitutes a disturbance of the peace. Thus, under Section 415 a person who engages in offensive behavior which has a tendency to provoke *others* to acts of violence or to in turn disturb the peace and quiet is guilty of disturbing the peace although his own conduct, while offensive was not in itself violent."

The appellant's acts constituted the type of offensive conduct prohibited by California Penal Code Section 415 in that it had a tendency to incite others to violent behavior or to disturb the peace. It is not a valid defense to a charge of disturbing the peace that the appellant's conduct was not violent or tumultuous if it was foreseeable that his acts would tend to cause

others to commit violent acts or disturb the peace. One may be guilty of the offense of breach of the peace if he commits acts likely to provoke violence or disturbance of good order, even though no such eventuality be intended.

Appellant's actions in wearing the jacket was "offensive conduct" within the purview of California Penal Code Section 415.

The California Court of Appeal declared (A. 31):

> "The words 'offensive conduct' have stood the test of time and have a commonly accepted meaning. The term 'offensive' has a well established meaning when used in connection with words which can cause a breach of the peace. In *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-572, the United States Supreme Court quoted with approval the following language from the opinion of the Supreme Court of New Hampshire in *State v. Chaplinsky*, 91 N. H. 310, 18 A. 2d 754: 'The word 'offensive' is not to be defined in terms of what a particular addressee thinks. . . . The test is what men of common intelligence would understand would be words likely to cause an average addressee to fight. . . . The English language has a number of words and expressions which by general consent are 'fighting words' when said without a disarming smile. . . . Such words, as ordinary men know, are likely to cause a fight. So are threatening, profane or obscene revilings. Derisive and annoying words can be taken as coming within the purview of the statute as heretofore interpreted only when they have this characteristic of plainly tending to excite the addressee

to a breach of the peace by the addressee, words whose speaking constitute a breach of the peace by the speaker — including 'classical fighting words,' words in current use less 'classical' but equally likely to cause violence, and other disorderly words, including profanity, obscenity and threats.'

"As modified by case law the only 'offensive' conduct prohibited by Section 415 is that which incites violence or has a tendency to incite others to violence or a breach of the peace. [*Cf. People v. Davis,* 68 Cal. 2d 481, 486-487.] This standard makes clear for triers of fact the nature of the forbidden conduct, and eliminates prosecutions or convictions for conduct which is merely offensive."

In *State v. Zwicker,* (1969) 41 Wis. 497, 508-510, 164 N. W. 2d 512, appeal dismissed (1969) 24 L. Ed. 2d 147, the Supreme Court of Wisconsin stated that certain activities are outside the protection of the First and Fourteenth Amendments and general regulatory statutes, not intended to control the content of speech, but incidentally limiting its unfettered exercise, are permissible when they have been found justified by subordinating valid governmental interests. Only conduct that unreasonably offends the sense of decency or propriety of the community is included in "disorderly conduct."

Appellee contends that California Penal Code Section 415 is constitutional and is neither overbroad, vague nor uncertain. Men of common intelligence need not guess at the meaning nor differ as to the application of the statute. (*Cameron v. Johnson,* (1968) 390 U.S. 611, 616, 20 L. Ed. 2d 182, 187).

## III.

## Appellant's Conviction Is Not a Violation of the First and Fourteenth Amendments.

### Facts.

On April 26, 1968, the appellant was observed in the corridor of the Los Angeles County Courthouse. The appellant was outside of Division 20 of the Los Angeles Municipal Court. He was wearing a jacket bearing various symbols and slogans including the phrase "Fuck the Draft." Women and children were present in the corridor. The appellant then entered the Division 20 courtroom, where he removed his jacket and held it folded over his arm (A. 18). The Appellant admitted wearing the jacket. Though he had not written the words, the appellant was aware of the fact the phrase "Fuck the Draft" was on the jacket. By wearing the jacket, the public was made aware of the depth of feeling against the draft shared by the appellant and his friends (A. 19-20). The appellant was convicted of violating California Penal Code Section 415.

### Statute.

Every person who maliciously and wilfully disturbs the peace or quiet of any neighborhood or person . . . by tumultuous or offensive conduct . . . is guilty of a misdemeanor. . . .

California Penal Code Section 415.

## ARGUMENT.

Appellee contends that people who want to propagandize protests or views have no constitutional right to do so whenever and however and wherever they please (*Adderly v. Florida,* (1966) 385 U.S. 39, 47, 17 L. Ed. 2d 149, 156). First Amendment provisions are not absolute, but must be balanced against other public interests (*American Communications Ass'n. v. Douds,* (1949) 339 U.S. 382, 399, 94 L. Ed. 925, 944; *Breard v. Alexandria,* (1951) 341 U.S. 622, 642, 95 L. Ed. 1233, 1248).

In *Walker v. Birmingham,* (1967) 388 U.S. 307, 316, 18 L. Ed. 2d 1210, 1217, this Court declared that "we have consistently recognized the strong interest of state and local governments in regulating the use of their streets and other public places. . . ." This Court emphatically rejected the notion "that the First and Fourteenth Amendments afford the same kind of freedom to those who would communicate ideas by conduct such as patrolling, marching, and picketing on streets and highways, as these amendments afford to those who communicate ideas by pure speech. . . ."

In *United States v. O'Brien,* (1968) 391 U.S. 367, 376 20 L. Ed. 2d 672, 679, this Court refused to accept the view that an apparently limitless variety of conduct can be labeled "speech" whenever the person engaging in the conduct intends thereby to express an idea. This Court has held that when "speech" and "nonspeech" elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms. The California Court of Appeal determined that appellant's conduct

consisted of "speech" and "nonspeech" elements. The "nonspeech" element consisted of walking through a public building with the premeditated intent of attracting the attention of others to the message on his jacket (A. 33).

Freedom of speech is not unconstitutionally abridged by legislation making a course of conduct illegal merely because the conduct was in part initiated, evidenced or carried out by means of language, either spoken, written or printed (*Cox v. Louisiana,* (1965) 379 U.S. 536, 555, 13 L. Ed. 2d 471, 484; *People v. Davis,* (1968) 68 Cal. 2d 481, 486, 67 Cal. Rptr. 547, 439 P. 2d 651).

The appellant engaged in "offensive conduct" in the Los Angeles County Courthouse, a building open to the public. From time immemorial streets, sidewalks and parks have been held in trust for the use of the public and have been used for purposes of assembly, communicating thoughts and discussing political questions (*Hague v. Committee for Industrial Organization,* (1939) 307 U.S. 496, 515, 83 L. Ed. 1423, 1436). City streets are recognized as a normal place for the exchange of ideas by speech or paper. But this does not mean the freedom is beyond all control (*Kovacs v. Cooper,* (1949) 336 U.S. 77, 87, 93 L. Ed. 513, 522).

The conduct of the appellant involved a substantial invasion of the rights of other persons who were present in the Los Angeles County Courthouse and, therefore, was not immunized by the constitutional guarantee of freedom of speech (*Tinker v. Des Moines Community School District,* (1969) 393 U.S. 503, 513, 21 L. Ed. 2d 731, 741). The right to speak one's mind would often be an empty privilege in a place and at a

time beyond the protecting hand of the guardians of public order.

Appellee contends that the children, women and men present in the Los Angeles County Courthouse corridor were forced to observe appellant's conduct. These people were in a similar position as the "unwilling listener" in *Kovacs v. Cooper, supra.* This Court in *Kovacs* recognized that "the unwilling listener is not like the passer-by who may be offered a pamphlet in the street but cannot be made to take it . . . on the street [the unwilling listener] is practically helpless to escape this interference with his privacy. . . ."

Persons in the Los Angeles County Courthouse were helpless to escape confrontation with appellant's protest. Appellant's opposition to the draft tends "to force public confrontation with the potentially offensive aspects of the" jacket. The "brazenness" of the protest ("Fuck the Draft") "heightens the offensiveness of the [jacket] to those who are offended by such material." (*Ginzburg v. United States,* (1966) 383 U.S. 463, 470, 16 L. Ed. 2d 31, 38).

Though stated in a different context the words of this Court appear applicable here:

> "Nothing in the Contitution compels us to listen to or view any unwanted communication, whatever its merit . . . [individuals do not have a] right to communicate offensively with another. . . . If this prohibition operates to impede the flow of even valid ideas, the answer is that no one has a right to press even 'good' ideas on an unwilling recipient." [*Rowan v. United States Post Office,* (1970) 397 U.S. 728, 25 L. Ed. 2d 736, 743-744].

Prohibition of appellant's offensive conduct does not abridge constitutional liberty since such activity bears no necessary relationship to the freedom to distribute information or opinion [*Schneider v. Irvington*, (1939) 308 U.S. 147, 161, 84 L. Ed. 155, 164]. Appellant's rights under the First Amendment were not violated when the appellant engaged in offensive conduct that could result in a breach of the peace.

One may be guilty of the common law offense of breach of the peace if he makes statements likely to provoke violence and disturbance of good order, even though no such eventuality be intended. Decisions to this effect are many, but examination discloses that, in practically all, the provocative language which was held to amount to a breach of the peace consisted of profane, indecent, or abusive remarks directed to the person of the hearer. Resort to epithets or personal abuse is not in any proper sense communiation or information or opinion safeguarded by the Constitution, and its punishment as a criminal act would raise no question under that instrument [*Cantwell v. Connecticut*, (1940) 310 U.S. 296, 309-310, 84 L. Ed. 1213, 1221].

Allowing the broadest scope to the language and purpose of the Fourteenth Amendment, it is well understood that the right of free speech is not absolute at all times and under all circumstances. There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, and libelous, and the insulting or "fighting" words—those which by their very utterance inflict injury or tend to incite an

immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality [*Chaplinsky v. New Hampshire*, (1942) 315 U.S. 568, 571-572, 86 L. Ed. 1031, 1035].

Appellant argues that "fuck" is a word society tolerates and often rewards when used in the arts and even in the mass media. Appellee contends that merely because the word appears in "Best Sellers" or in "constitutionally protected" books does not justify the public display of the phrase "Fuck the Draft." Individuals are free to determine whether they will read the books which contain language similar to that used by appellant.

However, the children, women and men present in the corridor of the Los Angeles County Courthouse were *not* free to avoid the appellant's jacket. These individuals were a "captive audience" forced to observe appellant's offensive conduct. Husbands and fathers might have breached the peace in an attempt to protect their wives and children from being confronted by the appellant's jacket.

Parents have the obligation to protect their children from the language used by appellant. While the well-being of its children, is a subject within a state's constitutional power to regulate, "it is cardinal with (this Court) that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." [*Ginsberg v. New*

*York,* (1968) 390 U.S. 629, 639, 20 L. Ed. 2d 195, 203-204].

If parents have the right and duty to keep "offensive material" out of reach of their children at home, should not parents who object to the public display of appellant's protest before their children be entitled to the State's protection? In *Prince v. Massachusetts,* (1944) 321 U.S. 158, 165, 88 L. Ed. 645, 652 this Court recognized that the State has an interest to protect the welfare of children and to see that they are "safeguarded from abuses" which might prevent their "growth into free and independent well-developed men and citizens." The State of California has the right to prevent the public display of appellant's jacket before children, women or men.

If "the most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic," [*Schenck v. United States,* (1919) 249 U.S. 47, 52, 63 L. Ed. 470, 473], appellee contends that certainly an individual may not wear a jacket like appellant's in a courthouse or on a public street. The wearing of the jacket would certainly provoke a husband who is with his wife, a parent who is with a child, or just the average citizen who does not use the term "fuck the draft" and is offended by the public display of such a term.

Allowing the broadest scope to the language and purpose of the First Amendment, it is well understood that the right of free speech is not absolute at all times and under all circumstances. The First Amendment, while prohibiting legislation against free speech as such, cannot have been and obviously was not, intended to give immunity for every possible use of the language.

The First Amendment does not allow the display of appellant's jacket in a public place.

In *Feiner v. New York*, (1951) 340 U.S. 315, 320, 95 L. Ed. 295, 300 this court respected the interest of a community in maintaining peace and order on its streets. Argument would appear unnecessary to demonstrate that the protest used by the appellant is likely to provoke the average person to retaliation, and thereby cause a breach of the peace.

**Conclusion.**

This Court has determined that "a function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea." [*Terminiello v. Chicago*, (1949) 337 U.S. 1, 4, 93 L. Ed. 1131, 1134].

While freedom of speech is in a preferred position, appellee does not believe the "function of free speech" is served by the display of a jacket bearing the phrase "Fuck the Draft" in protest over the war in Viet Nam.

If appellant's form of protest is deemed constitutionally protected, then one need merely imagine the type of signs that will be publicly displayed against private citizens. ("Fuck Catholics"; "Fuck Negroes"; "Fuck Whites"; "Fuck Jews";—signs carried in protest by opponents of these "groups"); against public institutions (a "Fuck the United States Congress" sign in protest over enactments of the National Legisla-

ture); or against public officials (a "Fuck Nixon" sign carried by an opponent of the war policies of the President of the United States; a "Fuck the Justices of the United States Supreme Court" sign displayed in protest of decisions rendered by this Honorable Court).

The display of such signs in a public place would tend to incite an immediate breach of the peace by observers of the sign. "Such [signs] are no essential part of any exposition of ideas and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." (*Chaplinsky v. New Hampshire*, (1942) 315 U.S. 568, 572, 86 L. Ed. 1031, 1035).

In *Schacht v. United States*, (1970) 398 U.S. 58, 26 L. Ed. 2d 44, 48, this Court stated that everyone in our country enjoys a constitutional right to criticize the government. However, the rights of free speech and assembly, while fundamental in our democratic society, still do not mean that everyone with opinions or beliefs to express may address a group at any public place and at any time. The constitutional guarantee of liberty implies the existence of an organized society maintaining public order, without which liberty itself would be lost in the excesses of anarchy.

Appellant's conviction was not a violation of his right of free speech. Appellant's form of protest was so inherently inflammatory as to come within the class of words which are likely to provoke the average person to retaliation and thereby cause a breach of the peace. In the view of the California Court of Appeal, the appellant's "conduct in ths case went beyond the permissive ambit of the First Amendment's protection as

circumscribed in" *Cantwell v. Connecticut,* (1940) 310 U.S. 296, 84 L. Ed. 1213, *Chaplinsky v. New Hampshire,* (1942) 315 U.S. 568, 86 L. Ed. 1031 and *Beauharnais v. Illinois,* (1952) 343 U.S. 250, 96 L. Ed. 919.

Appellant's conviction for "offensive conduct" in no way abridges or denies his right to protest the draft. In light of the firmly established principle that an individual does not have the constitutional right to propagandize protests whenever, however, and wherever he pleases, appellee contends that the conviction was not a violation of the First and Fourteenth Amendments. No one has the right to express his views by means of printing lewd and vulgar language which is likely to cause others to breach the peace to protect women and children from exposure to such language.

The judgment of the California Court of Appeal should be affirmed.

Respectfully submitted,

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IN THE

# Supreme Court of the United States

October Term, 1970
No. 299

PAUL ROBERT COHEN,

*Appellant,*

THE STATE OF CALIFORNIA,

*Appellee.*

Appeal From the Court of Appeal of California,
Second Appellate District.

**Motion of Charles H. Keating, Jr., for Leave to File a Brief as Amicus Curiae in Support of Appellant's Petition for Rehearing With Brief Annexed.**


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## Motion of Charles H. Keating, Jr., for Leave to File a Brief as Amicus Curiae in Support of Appellee's Petition for Rehearing With Brief Annexed.

Charles H. Keating, Jr., (hereinafter referred to as Moving Party), respectfully moves for leave to file a brief as *amicus curiae* in support of appellee, the State of California, in its petition for rehearing on file herein. The consent of the City Attorney of the City of Los Angeles, counsel for appellee, has been obtained, and has been filed with this Court. The consent of Melville B. Nimmer, counsel for appellants, has been requested and was refused.

Moving Party has a special interest in the subject matter of this appeal, having devoted considerable time, study, and effort to assisting law enforcement in combatting the spread of obscenity in the nation; first, as

the founder and co-counsel for Citizens for Decent Literature, Inc., and more recently, as a member on the Presidential Commission on Obscenity and Pornography. Although the majority opinion herein denies that an obscenity issue is present in this case.[1] Moving Party submits that such ruling is not supported by the basic principles upon which the obscenity crime is grounded. Such lack of support is apparent from the face of the opinion which fails to identify any case authority which requires that proposition as a rule of law.[2] It is Moving Party's contention that an examination of the development of the obscenity charge from its historical origin in *LeRoy v. Sedley*, 1 Sed. 168, 82 Eng. Reports 1036 (K.B. 1663) (arising as it did out of the common law concept of "breach of the peace", from which California Penal Code section 415, herein considered, was derived) and the succeeding three hundred and eight years of law enforcement

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[1]Associate Justice Harlan's opinion reads in part:

> "This is not, for example, an obscenity case. Whatever else may be necessary to give rise to the States broader power to prohibit obscene expression, such expression must be, in some significant way, erotic. *Roth v. United States*, 354 U.S. 476 (1957). It cannot plausibly be maintained that this vulgar allusion to the Selective Service System would conjure up such psychic stimulation in anyone likely to be confronted with Cohen's crudely defaced jacket . . ."

[2]*Roth v. U.S.*, 354 U.S. 476 (1957), which is the only authority cited in the Harlan opinion in support of such a holding, does not even mention the word "erotic", much less designate its equivalent as one of the delimiting boundaries of Roth. On the contrary, the *Roth* opinion, at footnote 20, adopts the meaning of obscenity developed in the case law and the definition of the A.L.I. Model Penal Code section 207.10(2) which holds that the sexual conduct being proscribed may be that which causes ordinary adults to respond with feeling of aversion, repugnance, shame or disgust, such as those dealing with the excretory function. See Morals Offenses and the Model Penal Code by Louis B. Schwartz in 63 Columbia L.R. 669 at p. 679, discussed *infra* at page 33.

which adhere to the principles arrived at in *Leroy v. Sedley,* suggest that the cavalier manner in which the majority opinion discarded the "obscenity" consideration does violence to established legal principles.

Moving Party is apprehensive that the decision in *Cohen v. California,* if allowed to stand, will cause even greater havoc in this nation's courts than did the analysis of the majority opinion in *Stanley v. Georgia,* 394 U.S. 557, 22 L. Ed. 2d 542, 89 S. Ct. 1243 (April 7, 1969). It took two years for this Honorable Court to correct the misguidance flowing from the *Stanley* opinion. See *United States v. 37 Photographs,* .... U.S. .... 28 L. Ed. 2d 822, 91 S. Ct. .... (May 3, 1971). The damage done to this nation's standards of public decency as a result of the *Stanley* opinion is incalculable and it would be impossible to estimate the time that it will take to repair such damage, if indeed, such is at all possible.[3] Moving Party submits that, if at this time, another "Stanley" situation is unleashed upon this nation's courts, the harm to the rule of law, upon which this nation is grounded, and the moral fiber of this nation will be immeasurably greater.

Moving Party recognizes the inherent improbabilities of this Court's granting a rehearing on the matter herein, yet feels compelled in this amicus brief to address

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[3]See *Roth v. U.S.,* 354 U.S. 476 at 490, footnote 28, and the individual views of Senator Hugh Scott in Report No. 1097 of the Committee on the Judiciary, dated April 29, 1968, on the Omnibus Crime Control and Safe Streets Act of 1967, 90th Congress, 2nd session at page 213:

> "To those who say that a Court decision cannot 'cause' crime, I would remind them of the excellent communication system of the underworld, the so-called grapevine of the prison 'sea lawyers'. One need not be a legal scholar to sense the tendency of the law, and where it is felt that a 'technicality' will prevent prosecution, the result is bolder action . . ."

himself to that objective in the hope that Justice Harlan, can be persuaded to recant.[4] It is Moving Party's hope that Justice Harlan will recall to mind his vote with the majority in *Stanley* and the aberrations that crept into the law as a result of that opinion, and would be willing to reexamine his vote in *Cohen* in the light of the can of worms that that decision is certain to open.

Two years ago, Moving Party had serious doubts that Justice Harlan acceded to everything that the majority opinion in *Stanley* could be read as saying and, based thereon, prepared a draft of a petition for rehearing for the State of Georgia, which was aimed at informing Justice Harlan of such interpretations. The petition was never filed with this Court inasmuch as counsel for the State of Georgia was unwilling to give this Court an opportunity to rule against him further. In retrospect, Moving Party considers that it was an error in judgment that the same was not brought to the attention of this Court in the form of an independent petition requesting this Court to reconsider the matter on its own motion for it would have focused the attention of Justice Harlan and others on the legal aberrations which were to follow from the language of the *Stanley* opinion.[5]

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[4]Rule 58 of the U.S. Supreme Court provides in part as to rehearings:

> "A petition for rehearing . . . will not be granted, except at the instance of a justice who concurred in the judgment or decision, and with the concurrence of a majority of the Court . . ."

Moving party understands this to mean that a rehearing would be in order if Justice Harlan were to reexamine his position.

[5]An information copy was transmitted to the Clerk of the Georgia Supreme Court two months after the *Stanley* decision, as being of academic interest to that Court. A copy of the latter

It is Moving Party's contention that, as in *Stanley*, the espousals of the Harlan opinion in *Cohen* run contrary to Justice Harlan's basic philosophy. Justice Harlan has always respected the inherent rights of government under the tenth amendment and regarded the judicial systems of the several States as testing grounds in the search for truth and justice. The *Cohen* opinion does violence to those tenets.

If, in spite of this nation's laws outlawing "lewd conduct", an individual has an absolute right to broadcast to the public his opposition to any cause or principal by employing lewd language such as "F— the (cause or principal)" and "the State may not, consistently with the First and Fourteenth Amendment, make the public display of such a single four-letter expletive a criminal offense" and the public (in this case, those in the Los Angeles Court House) are required to "avoid further bombardment of their sensibilities simply by averting their eyes" because the state cannot "forbid particular words without also running a substantial risk of suppressing ideas in the process" then surely Justice Harlan's opinion has opened Pandora's Box, and in the same stroke succeeded in painting this Court into a corner. See Rule 40(5) of the Rules of the Supreme Court of the United States which provide in part, as follows:

> "5. Briefs must be . . . free from . . . scandalous matter. Briefs not complying with this paragraph may be disregarded and stricken by the Court . . ."

In the light of the *Cohen* rationale, how can this Court justify the limitations on free speech imposed by

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communication dated June 18, 1969 together with the petition which was drafted on the *Stanley* matter is attached to this brief as Appendix A.

Rule 40(5)—particularly, in light of the fact that the business of the Supreme Court offers a forum which symbolizes the essence in the exchange of ideas. If the State cannot regulate objective "lewd conduct" in the public corridor of its buildings, how can this Court accomplish that task in its own Courtroom "without also running a substantial risk of suppressing ideas in the process?" or, as in the case of the legendary fable of "The Partial Judge," does the answer to the constitutional question depend upon whose ox is gored. What is this Court prepared to say the rule of law will be when some disgruntled person, be he litigant or observer, decides to don his jacket in the manner of Cohen, and broadcast a message to the members of this Court and the spectators in attendance. This is not a fanciful inquiry, for only a naive person would fail to recognize the historical significance of the tool of "lewdness" as an instrument of revolution. See *Dillingham v. State of Maryland*, 267 A. 2d 277 (July 15, 1970) where the editor of the Washington Free Press resorted to "lewdness" in his attack on a trial judge; at page 72.

On March 21, 1969, appellant was arrested in front of the Montgomery County Police Headquarters for selling a detective an issue of the *Washington Free Press* newspaper, Vol. 2, No. 52, March 15-31, 1969. On page three of the issue, at the top of the page in bold block letters approximately one inch high, there is the headline "Dear Judge Pugh" and in smaller print "pages 9-15". On page nine of the issue, in white letters approximately one and one-eighth inch high, on a black background, there is the headline "A Pornobiography." In the lower center portion of that page,

there is a cartoon approximately four and one-quarter inches square which shows a nude human figure (purported to be Judge James H. Pugh of the Circuit Court for Montgomery County) masturbating. The cartoon shows the human figure sitting on a large chair with a swastika on it, in front of a podium or lectern on which are hanging various items such as a hypodermic needle and a whip. The entire cartoon, including the human figure, is a line-type drawing, being very simple artistically and out of natural proportions. The human figure is abstract in an artistic sense, bearing only moderate resemblance to actual human form. The limbs and general anatomy are out of proportion, there is no hair on the head, and the face is expressionless. Above the figure but within the four and one-quarter inch square of the cartoon is the caption "HE' COMM D'JUDJE" [sic]. Surrounding the cartoon in a box ten inches by four and three-quarter inches is a biography of personal facts concerning Judge Pugh, e.g. club memberships, home address, and alleged conflicts of interests. Surrounding the cartoon and biographical material on the rest of the page is a critique in hostile terms of Judge Pugh in his professional capacity; the entire page measures seventeen inches by approximately eleven and one-half inches. Page nine is one of twenty-four pages in the total newspaper. Pages 10 to 15 are apparently intended as a continuation of the critique of the judicial system in general begun on page nine. A summary of the newspaper and the expert testimony is shown in the appendixes.

As an example of the type of "lewd" conduct, which is widespread on the nation's campuses, and affected by this decision, see *Goldberg v. Regents of the University of California,* 57 Cal. Rptr. 463 (Feb. 28, 1967). Hearing in the California Supreme Court denied on April 26, 1967 and *State of Delaware v. Ceci,* 255 A. 2d 700 (May 29, 1969). For a representative example of how the Harlan rationale will effect other areas, see the opinion of Court of Appeal's Justice Jones in *In Re Perlman,* ..... *Cal. Rptr.* ....., ..... Cal. App. 2d ..... (June 18, 1971), handed down *after* this Court's decision in *Cohen,* granting a habeas corpus writ after conviction and affirmance on appeal on an obscenity charge for exhibiting the four letter word in a sign on the rear of petitioner's automobile.

It is respectfully requested that the applicant herein, Charles H. Keating Jr., be granted leave to file a brief amicus curiae, setting forth arguments on the above, and related issues in the cause herein.

Dated July 2, 1971.

CHARLES H. KEATING JR.,
*Amicus Curiae.*

IN THE

# Supreme Court of the United States

October Term, 1970
No. 299

PAUL ROBERT COHEN,

*Appellant,*

*vs.*

THE STATE OF CALIFORNIA,

*Appellee.*

**Appeal From the Court of Appeal of California, Second Appellate District.**

## Brief Amicus Curiae of Charles H. Keating, Jr., in Support of Appellee's Petition for Rehearing.

### Statement of the Case.

The record of the trial proceedings below, was before this Court by way of a settled Statement on Appeal (Appendix pp. 18-21). That statement reveals the following facts in support of the conviction: On the night of April 25, 1968, Appellant Cohen met with a group of friends and acquaintances who suggested the need to inform the public of their opposition to the Vietnam War, and to the Draft. Immediately following such discussion, some of those in attendance, but other than the Appellant, placed the words "Fuck the Draft" on Appellant's jacket as well as a "peace symbol" consisting of a circle with a verticle line running through

the circle, and two diagonal lines meeting the verticle line in the lower portion of the circle. Appellant placed a second "peace symbol" on the jacket. On the following day, April 26, Appellant was observed by Sergeant Splawn in the Courthouse corridor outside Division 20 wearing the said jacket with the words "Fuck the Draft". Women and children were present in the said corridor. Appellant entered the Courtroom of Division 20 where he removed his jacket, and held it folded over his arm. When the Appellant emerged from the courtroom into the Courthouse corridor, Sergeant Splawn placed the Appellant under arrest. Appellant stated that by wearing the said jacket the public was made aware of the depth of feeling against the draft shared by himself and his friends.

On April 29, 1968 a complaint was filed charging the Appellant with having committed a misdemeanor, on April 26, 1968 at Los Angeles, California to wit: violation of section 415 of the California Penal Code. Penal Code section 415 reads as follows:

> § 415. *Disturbing the peace; noise; use of public streets of unincorporated town for offensive conduct, horse racing, or shooting; indecent language; punishment*
>
> *Every person who maliciously and willfully disturbs the peace or quiet of any neighborhood or person, by* loud or unusual noise, or by tumultuous or *offensive conduct,* or threatening, traducing, quarreling, challenging to fight, or fighting, or who, on the public streets of any unincorporated town, or upon the public highways in such unincorporated town, run any horse race, either for a wager or for amusement, or fire any gun or

pistol in such unincorporated town, or use any vulgar, profane, or indecent language within the presence or hearing of women or children, in a loud and boisterous manner, *is guilty of a misdemeanor,* and upon conviction by any Court of competent jurisdiction shall be punished by fine not exceeding two hundred dollars, or by imprisonment in the County Jail for not more than ninety days, or by both fine and imprisonment, or either, at the discretion of the Court (our emphasis).

The complaint against Paul Robert Cohen read as follows (Appendix, p. 1):

> Personally appeared before me, the undersigned, who, first being duly sworn, complains and says: That on or about Apr. 26, 1968, at and in Los Angeles City, in the County of Los Angeles, State of California, a misdemeanor, to-wit: VIOLATION of Section 415 of the Penal Code of the State of California was committed by PAUL ROBERT COHEN (Whose true name to affiant is unknown), who at the time and place last aforesaid, *did wilfully and unlawfully and maliciously disturb the peace and quiet of the neighborhood of 110 North Grand and the peace and quiet of this complainant and other persons then and there being present, by then and there, engaging in* tumultuous and *offensive conduct*. All of which is contrary to the law in such cases made and provided, and against the peace and dignity of the People of the State of California. Said Complainant therefore prays that a warrant may be issued for the arrest of said Defendant that he may be dealt with according to law. (our emphasis).

Subscribed and sworn to before me on Apr. 29, 1968.

/s/ H. A. Spearman
H. A. SPEARMAN
GEORGE J. BARBOUR
Clerk of the Municipal
Court of Los Angeles
Judicial District, in said
County and State

By.....
Deputy Clerk

During the course of the trial the court made the following rulings (Appendix, p. 20):

> "1. The Court held that 'tumultuous or offensive conduct' within the meaning of Penal Code section 415 may consist of written words unaccompanied by any actual or threatened violence."
>
> "5. The Court held, as a matter of law, that the words 'Fuck the Draft' are obscene within the Constitutional meaning of that word".

The Trial Court found the Appellant guilty as charged, and sentenced him to thirty days in jail. The Appellate Department of the Superior Court reversed the conviction, but certified to the Court of Appeal the question of law upon which the reversal was based: The question presented was: "Does conduct which may be "offensive" but lacks any aspect of being "tumultuous" violate Penal Code section 415, covering disturbances of the peace?

In the Court of Appeal, Appellant contended that the offense of disturbance of the peace does not exist

without actual or threatened violence or behavior which is likely to create a disturbance. The Court of Appeal in *People v. Cohen,* 1 Cal. App. 3d 94; 81 Cal. Rptr. 503, 506, agreed with this statement of the law (Appendix, p. 28), but reached a different conclusion in applying the law to the facts, holding at page 506:

> "Thus, under section 415 a person who engages in offensive behavior which has a tendency to provoke *others* to acts of violence or to in turn disturb the peace and quiet is guilty of disturbing the peace although his own conduct, while offensive, was not in itself violent.
>
> In the matter before us the defendant deliberately wore a jacket emblazoned with language which is clearly offensive and below the 'minimum standard of propriety and the accepted norm of public behavior' (Goldberg v. Regents of University of California, 248 Cal.App.2d 867, 880, 57 Cal.Rptr. 463) at least when paraded through a courthouse corridor containing women and children. The defendant's conduct consisted of more than a quiet and peaceful assertion of his convictions about the draft. He carefully chose the forum for his views where his conduct would have an effective shock impact. The defendant's stated purpose was to force a confrontation with others as to his opinion of the draft. The expression he chose to display on his jacket is one which is not used publicly to espouse a philosophy or a personal conviction. He was intent upon attracting the attention of others to his views by the sheer vulgarity of his expression. He must have been aware that his behavior would vex and annoy a substantial portion of his unwilling 'audience'. His

conduct was, therefore, malicious under Penal Code section 7.[2]

It was certainly reasonably foreseeable that such conduct might cause others to rise up to commit a violent act against the person of the defendant or attempt to forceably remove his jacket. The fact that the police intervened and that the defendant was arrested before violence occurred does not make his conduct any the less provocative. We think it also a reasonable inference from the time and place of defendant's act that he intended to provoke disorder.

It is our conclusion that the defendant's acts constituted the type of offensive conduct prohibited by section 415 in that it had a tendency to incite others to violent behavior or to disturb the peace.

It is also our view that is is not a valid defense to a charge of disturbing the peace that the defendant's conduct was not violent or tumultuous if it was foreseeable that his acts would tend to cause others to commit violent acts or disturb the peace."

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[2]Penal Code section 7 provides in part as follows:

"* * * The words 'malice' and 'maliciously' import a wish to vex, annoy, or injure another person, or an intent to do a wrongful act, established either by proof or presumption of law; * * *."

The California Supreme Court declined review by a divided vote. This Court postponed the question of jurisdiction to a hearing of the case on the merits, 399 U.S. 904, and after argument, noted in its opinion that jurisdiction had properly been invoked on Cohen's claim that, "as construed to apply to the facts of this case, the statute infringed his rights to freedom of expression guaranteed by the First and Fourteenth Amendments of the Federal Constitution."

## ARGUMENT.

### I.

### As Construed to Apply to the Facts of This Case, California Penal Code Section 415 Did Not Infringe Appellant's Rights to Freedom of Expression, as Guaranteed by the First and Fourteenth Amendments of the Federal Constitution.

#### A. The Construction of California Penal Code Section 415 Adopted by the Court of Appeal as to the Legal Connotation of "Offensive Conduct" Is Binding on This Court.

In its opinion in *People v. Cohen*, 81 Cal. Rptr. 503, 1 Cal. App. 3d 94 (Oct. 22, 1969), the Court of Appeal, in construing California Penal Code section 415, ruled as follows:

> "Breach of the peace and disturbing the peace are synonymous terms. Section 415 when enacted in 1872 was a codification of the existing common law crime of breach of the peace. Therefore, in resolving the novel question presented us, *we can look to the common law to assist us in assaying the legislative intent behind the use of the words 'offensive conduct'*". (Our emphasis).

Where the validity of a statute has been sustained in the face of federal objections, the Supreme Court must accept the state court's construction and proceed to test the validity on that basis. *General Trust Co. v. Blodgett*, 287 U.S. 509, 513; *Kingsley Pictures Corporation v. Regents*, 360 U.S. 648, 688. See also this court's review of the judicial gloss placed by state and federal courts on the language employed in obscenity statutes in *Roth-Alberts*, 354 U.S. 476.

Those portions of the majority opinion herein reading:

> "No fair reading of the phrase 'offensive conduct' can be said sufficiently to inform the ordinary person that distinctions between certain locations are thereby created"

and

> ". . . and where that portion of the statute upon which Cohen's conviction rests evinces no concern, either on its face or as construed by the California courts, with the special plight of the captive auditor, but, instead, indiscriminately sweeps within its prohibitions all 'offensive conduct' that disturbs 'any neighborhood or person' . . ."

fly in the face of the ruling of the Court of Appeal and the rule of construction expressed by this Court in *Blodgett (supra)* and *Kingsley Pictures Corporation (supra)*.

**B. The Construction of Penal Code Section 415, Applied by the Court of Appeal Is Nothing More Than a Classical Application of the Common Law Crime of "Breach of the Peace".**

In his textbook on criminal law, Professor Rollin M. Perkins discusses California Penal Code section 415 and its relation to the common law crime of "breach of the peace" as follows:[1]

> The beginning of our criminal justice, in the troublous days of the dawn of civilization on the British Isles, was concerned very largely with the problem of keeping the peace. Because of this fact all early indictments included some such

[1]Criminal Law, by Rollin M. Perkins, The Foundation Press Inc., (1957) at pages 340, 341.

phrase as "against the peace of the King;" and until recent statutory provisions for simplification, indictments in this country were thought to be incomplete without some such conclusion as "against the peace and dignity of the state." As a result of this history all indictable offenses are sometimes regarded as deeds which violate the public peace, and hence in a loose sense the term "breach of the peace" is regarded as a synonym for crime. On the other hand there is a very obvious distinction in this regard between a secret act of embezzlement and the public tumult of a riot. The secret act of embezzlement does not disturb the public peace except in a purely theoretical sense. Our present concern is not with offenses which disturb the peace only theoretically, but with *those crimes which are punished primarily because of their actual disturbance of the public tranquillity, or their tendency to cause such a disturbance. Needless to say, there is a* social interest in *preserving the peace and tranquillity of the community*[4] and the common *law provided a penalty for any wilful deed* which violates this *interest without lawful justification or excuse.* If such a deed also violates some other social interest, such as the social interest in protecting the persons of individuals, the crime is commonly classified under some other appropriate heading. If such is not the fact, and the deed is punished primarily because of the violation of the social interest in the public peace and security, the offense may have some special name such as riot, affray, or disturbance of public assembly. If the deed is punished primarily because of the violation of

this social interest, and there is no other special name for the particular offense, the phrase "breach of the peace" or "disturbing the peace" is used as the name of the crime itself. Stated in other words:

> *Any wilful deed committed without lawful justification or excuse, which unreasonably disturbed the public peace and tranquillity, or tended strongly to cause such a disturbance, was an offense at common* law; and unless there was some special name for the misdeed, it was called a "breach of the peace." Some statutes follow this same plan; others employ some other label for each offense within this field and use "breach of the peace" only as part of the *description of various* misdeeds known by such other names. (Our emphasis).

At footnote 4 of the above text, the author noted:

> 4. "The common law hath ever had a special care and regard for the conservation of the peace; for peace is the very end and foundation of civil society." 1 Bl. Comm. *349. "They attack directly that public order and sense of security, which is one of the first objects of the common law. . . ." State v. Huntley, 25 N.C. 418, 421 (1843).

It is interesting to note, in connection with Cohen's conduct in this case, that the first obscene exhibition crime reported under our English system, was one which was introduced to the common law courts on the theory of a "breach of the peace", the same situation that exists herein. See *LeRoy v. Sedley*, 1 Sed. 168, 82 Eng. Rep. 1036 (K.B. 1663). The issue in

*Sedley* which perplexed the House of Lords was the lack of evidence of "force" in connection with Sedley's exposure of his person, and obscene address to the Covent Garden community. There, as here, the argument was made that those present might choose whether or not they would look upon him. See the comment of Justice Reynold in *Rex v. Curl,* 2 Strange 792. It was finally decided in *Sedley's* case that force was not an essential ingredient of the criminal charge, and that such public conduct was criminal for the reason that it was in contravention of the public morals, as defined by the Court, which was the custodian of the public morals. See *Rex v. Curl,* 2 Strange 789 (1727). It was from *Sedley* and *Curl* that the common law judges arrived at their judicial authority to declare certain public conduct to be illegal as a *matter of law.* See 75 Harvard L. R. 1652 at 1653; and it was from such precedents that California trial judge James Harvey Brown, herein, was empowered by the California judicial system to declare Cohen's written words of "Fuck the draft" to be obscene as a *matter of law,* and that Court of Appeal Judges Alarcon, Roth, and Fleming herein were empowered to declare as a *matter of law,* that the same was language which was "lewd" and "below the minimum standard of propriety, and the accepted norm of public behavior . . . at least when paraded through a courthouse corridor containing women and children." (Appendix, pp. 29, 34).

**C. The Majority Opinion Does Not Answer the Limited Jurisdictional Question Which the Court Itself Has Framed.**

This Court's notice of jurisdiction was limited to whether California Penal Code Section 415, *as construed by the California Court of Appeal to apply to*

*the facts of this case,* was an infringement on the individual rights of Cohen as guaranteed by the First and Fourteenth Amendment. See paragraph 5 of Justice Harlan's opinion reading:

> The question of our jurisdiction need not detain us long. Throughout the proceedings below, Cohen consistently claimed that, as construed to apply to the facts of this case, the statute infringed his rights to freedom of expression guaranteed by the First and Fourteenth Amendments of the Federal Constitution. That contention has been rejected by the highest California state court in which review could be had. Accordingly, we are fully satisfied that Cohen has properly invoked our jurisdiction by this appeal. 28 U.S.C. §1257(2); *Dahnke-Walker Milling Co. v. Bondurant*, 257 U.S. 282 (1921).

In its opinion construing California Penal Code Section 415, the Court of Appeal (adhering to the common law principles first enunciated in *LeRoy v. Sedley,* 1 Sed. 168 (1688)) had ruled, both as a matter of law and California Statutory construction, that "offensive conduct" as used in the California Penal Code "Breach of the Peace" statute included lewd language, such as "Fuck the Draft" when willfully paraded through a courthouse corridor containing women and children (See Appendix pp. 29, 34). *Amicus* submits that, under the narrow jurisdictional question framed in this Court's notice of jurisdiction, and posed by the rule of law enunciated by the Court of Appeal below, the cavalier statement of the majority opinion to the contrary that "This is not, for example, an obscenity case" does not supply a proper response to the constitutional

issue which is before this Court. Further, in view of the limited jurisdictional question, the Court's circuitous discussion revolving about a canvass of "various matters which this record does not present" is a clear violation of the constitutional duty of this Court as expressed in *United States v. Raines,* 362 U.S. 17, 80 S. Ct. 519, 4 L. Ed. 2d 524, 529 (Feb. 29, 1960):

> The very foundation of the power of the federal courts to declare Acts of Congress unconstitutional lies in the power and duty of those courts to decide cases and controversies properly before them. This was made patent in the first case here exercising that power—"the gravest and most delicate duty that this Court is called on to perform." Marbury v. Madison (US) 1 Cranch 137, 177-180, 2 L. ed 2d 60, 73, 74. This Court, as is the case with all federal courts, "has no jurisdiction to pronounce any statute, either of a State or of the United States, void, because irreconcilable with the Constitution, except as it is called upon to adjudge the legal rights of litigants in actual controversies: In the exercise of that jurisdiction, it is bound by two rules, to which it has rigidly adhered, one, never to anticipate a question of constitutional law in advance of the necessity of deciding it; the other never to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied." Liverpool, N. Y. & P. S. S. Co. v. Commissioners of Emigration, 113 US 33, 39, 28 L ed 899, 901, 5 S Ct 352.
>
> Kindred to these rules is the rule that one to whom application of a statute is constitutional will not be heard to attack the statute on the ground

that impliedly it might also be taken as applying to other persons or other situations in which its application might be unconstitutional. . . . In Barrows v. Jackson, 346 US 249, 97 L ed 1586, 73 S Ct 1031, this Court developed various reasons for this rule. Very significant is the incontrovertible proposition that it "would indeed be undesirable for this Court to consider every conceivable situation which might possibly arise in the application of complex and comprehensive legislation."

**D. The Limited Jurisdictional Facts in Cohen, Delineated in Point IC Above, Do Not Present the Larger Question of Whether Convictions Based Upon "Offensive Conduct" of a Type Other Than "Lewdness", Such as in In re Bushman, Would Be Unconstitutional Under the Construction Given the Statute by the Court of Appeal Herein.**

At footnote 2 of the majority opinion, the Court considered and rejected the supervening opinion of the California Supreme Court in *In re Bushman,* 1 Cal. 3d 767; 83 Cal. Rptr. 375, 463 P. 2d 727 (Jan. 27, 1970) in these words:

> [2]The suggestion has been made that, in light of the supervening opinion of the California Supreme Court in *In re Bushman,* 1 Cal. 3d 767, 463 P. 2d 727 (1970), is it "not at all certain that the California Court of Appeal's construction of §415 is now the authoritative California construction." *Post,* at .... (Blackmun, J., dissenting). In the course of the *Bushman* opinion, Chief Justice Traynor stated:
>
> "[One] may . . . be guilty of disturbing the peace through 'offensive' conduct [within the meaning of §415] if by his actions he wilfully and mali-

ciously incites others to violence or engages in conduct likely to incite others to violence. (*People v. Cohen* (1969), 1 Cal. App. 3d 94, 101, 81 Cal. Rptr. 503.)" 463 P. 2d, at 730.

We perceive no difference of substance between the *Bushman* construction and that of the Court of Appeals, particularly in light of the *Bushman* court's approving citation of *Cohen*.

That both the majority and minority opinions failed to discern that the *Bushman* opinion as applied to the facts in the *Bushman* case had no bearing on the *Cohen* opinion as applied to the special *Cohen* facts, demonstrates that this Court has overlooked the critical significance of the extremely narrow issue presented herein.

The "offensive conduct" in *Cohen* was of a different type from that which was involved in *Bushman*. In *Cohen*, the "offensive conduct" involved "public lewdness" which, in and of itself, was conduct which was identified and proscribed as a separate offense under state law. As such, it had an objective standard for ascertainment. Accordingly, it was a type of conduct which the Court of Appeal rationally could presume was likely to incite others to violence as a matter of law. See paragraph 4 of this Court's majority opinion reading

"In affirming the conviction the Court of Appeal held that 'offensive conduct' means 'behavior which has a tendency to provoke *others* to acts of violence or to in turn disturb the peace,' and that the State had proved this element *because, in the facts of this case, it was certainly reasonably forseeable that such conduct might cause others*

> *to rise up to commit a violent act against the person of the defendant or attempt to forceably remove his jacket . . .*" (our emphasis).

As noted above in Point IB, this presumption flowing from the nature of the *Cohen* facts has been recognized by our English law for over 300 years.

On the other hand, the petitioner's conduct in *Bushman* is described at page 378 as

> "On the morning of the following day, July 6, 1967, Donald M. Prentice, president of the airport board, convened a meeting of the full five-member board. The roll call was taken and the first three items on the agenda were considered. As the board reached the fourth item, petitioner entered the room, carrying a bucket of gravel in both hands at chest level. Without speaking he walked to the desk where Prentice was presiding. According to the People's evidence petitioner deliberately dumped the contents of the bucket over Prentice's desk and papers . . ."

The *Bushman* conduct was not such as violated any long standing public policy nor was it readily identifiable under objective legal standards. In this light the Court of Appeals rationale in *Cohen* would have no direct application to the *Bushman* facts.

**E. Cohen's Conviction Rests Squarely on "Conduct." Speech Is Not an Issue.**

This is not the type of case where it could rationally be argued that Cohen may have been convicted for the subjective opinion he communicated regarding the Selective Service System. *Cf.* Justice Harlan's opinion writing for the majority in *Street v. New York*, 394

U.S. 576, 22 L. Ed. 2d 572, 89 S. Ct. 1354. There is reason to believe that most judges would share Cohen's subjective distain for the inequities inherent in the system as presently operated, yet those same justices would not, in *amicus'* view, countenance his communicating a message in a "lewd" fashion to innocent bystanders in derogation of the State's policy against public lewdness. Ordinary reason does not support that portion of the majority opinion reading:

> "Thus, we deal here with a conviction resting solely upon 'speech', *cf. Stromberg v. California,* 283 U.S. 359 (1931), not upon any separately identifiable conduct which allegedly was intended by Cohen to be perceived by others as expressive of particular views but which, on its face, does not necessarily convey any message and hence arguably could be regulated without effectively repressing Cohen's ability to express himself . . ."

Even assuming that the right to communicate ideas through speech and press must carry with it the opportunity to win the attention of the public, still the state, under its 10th amendment police powers has the right to regulate the process of winning attention when substantial state interest necessitates protection. See *State of Delaware v. Ceci,* 255 App. 2d 700, 704 (May 29, 1969).

**F. This Is a "Breach of the Peace" Case Involving an Underlying Obscene Display.**

Contrary to the majority opinion's unsupported assertion, this *is* an obscenity case, in that an obscene display is the basis for the "breach of the peace" charge. That portion of the majority opinion, reading:

> "This is not, for example, an obscenity case. Whatever else may be necessary to give rise to the States' broader power to prohibit obscene expression, such expression must be, in some significant way, erotic. *Roth v. United States,* 354 U.S. 476 (1957). It cannot plausibly be maintained that this vulgar allusion to the Selective Service System would conjure up such psychic stimulation in anyone likely to be confronted with Cohen's crudely defaced jacket."

misinterprets the function of obscenity laws and the nature of the 10th Amendment right of government to proscribe "public lewdness" which is not so limited. See Motion of Charles H. Keating Jr., herein, at footnote 2.

1. *Under the Common Law, Obscenity, Indecency and Lewdness in the Nature of Cohen's Conduct Were a Public Nuisance.*

Obscenity or indecent exhibitions of a nature to shock the public sense of decency were a public nuisance and indictable at the Common Law. *Crain v. State,* 3 Ind. 193 (1851). In Perkins on Criminal Law, Foundation Press, 1954, Professor Rollin Perkins states, at page 336:

> "Obscene or indecent exhibitions of a nature to shock the public sense of decency are also public nuisances and indictable at Common Law. This label includes not only obscene and indecent theatrical performances or side shows, but other disgusting practices such as letting a stallion to mares in the streets or some other public place. . . ."

For a modern application of this principle, see *Bloss v. Paris Township,* 157 N.W. 2d 260 (Apr. 1, 1968) holding the operation of an outdoor drive-in theater showing motion pictures which "dwell on the subject of sex and the human anatomy" to constitute a public nuisance. In *Bloss,* the Michigan Supreme Court stated the following, as to the nature of such public nuisances, at page 261:

> "What is a public nuisance? Joyce, Law of Nuistances, Section 7, page 15, defines a public nuisance, inter alia, as an act which offends public decency. Cited to Section 66, page 13, is the case of Hayden v. Tucker, 37 Mo. 214, in which it was held that the keeping and standing of jacks and stallions within the immediate view of a private dwelling and a public highway is a nuisance which equity will enjoin as a 'disgusting annoyance perpetually bringing the blush of shame to modesty and innocence.' The factual difference between the Hayden and the instant case, is that there involved was a display of equine and here pictures of the human frame, is not a distinction calling for a different conclusion as to the nuisance question."

Similarly, in *Cactus Corporation d.b.a. The Apache Drive-In v. State of Arizona, ex rel. Murphy,* 480 P. 2d 375 (Feb. 9, 1971), the Court of Appeals of Arizona, Division 2, recently affirmed the judgment of the trial court which permanently enjoined The Apache Drive-In Theater from displaying, showing or running a motion picture film, entitled "Lysistrata", *on any other motion picture film of the same character,* on the grounds that such activity is or would be a public

nuisance as defined by A.R.S. Sect. 13-601, which defines, in part, a public nuisance as:

> "Anything which is injurious to health, or is indecent, or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property by an entire community or neighborhood, or by a considerable number of persons. . . ."

At page 378, the Arizona Court of Appeals stated:

> "In the case at bar, there is no necessity for a finding of damage in that the activity in question is a public nuisance per se, which produces such annoyance, inconvenience and discomfort that the law presumes damage. City of Phoenix v. Johnson, 51 Ariz. 115, 75 P.2d 30 (1938); Engle v. Scott, supra. Such nuisances are malum in se. Even if it is assumed arguendo that the activity is a nuisance per accidens, the burden of showing damage has been met by plaintiff. . . .
>
> "The defendant's third contention is that the trial court's rulings that the activity here was a public nuisance and that it should be abated by injunction were erroneous. We do not agree. A mere reading of the statutes defining public nuisances, A.R.S. Section 13-601 (1956) in light of the facts before us, clearly indicates the correctness of the trial court's characterization of the activity sub judice as that of a public nuisance. . . ."

On March 4, 1971, the Georgia Supreme Court, in an unanimous decision, upheld the *inherent right* of law enforcement officials to enjoin the motion picture film "I Am Curious (Yellow)" as a public nuisance.

In *Evans Theatre Corp. et al. v. Slayton, Dist. Atty. of Fulton County,* ..... Ga. ...., .... S.E. .... (Mar. 4, 1971), Presiding Judge Mobley, speaking for an unanimous court, said:

> "We recognize the principle that equity will take no part in the administration of the criminal law. Code §55-102. However, it has long been the rule in this State that the State has an interest in the welfare, peace, and good order of its citizens and communities, and that an action may be maintained at the instance of the prosecuting attorney to enjoin an existing or threatened public nuisance, even though the nuisance constitutes a crime punishable under the criminal laws. See: (Citations).
>
> "The exhibition of an obscene motion picture is a crime involving the welfare of the public at large, since it is contrary to the standards of decency and propriety of the community as a whole. The welfare of the whole community is served by restraining the showing of such an obscene film.
>
> "A court of equity was authorized to enjoin the exhibition of this obscene motion picture to the public."

See also *Judson v. Zurhorst,* 30 Ohio Cir. 9, at page 14, where the Ohio court said:

> "There remains one contention for the granting of this injunction on the facts alleged in the petition. That is on the alleged indecency of the pamphlet. The law does not favor obscenity or indecency.
>
> "In a proper case instituted by one legally authorized to represent the public, the public exhibi-

> tion of lewd pictures, immodest statuary, or immoral plays would unquestionably be enjoined, or otherwise suppressed; and for the same reason an obscene book or pamphlet is prohibited transit through the United States mail. . . ."

On the issue of whether indecency in the form of public lewdness in theatrical performances can be stopped in a civil action to abate a public nuisance in California, see *Weis v. Superior Court of San Diego County*, 30 Cal. App. 730, 159 Pac. 464 (June 14, 1916). In *Weis*, that issue was before the District Court of Appeals, 2nd District, on a writ of prohibition. The District Attorney had commenced a civil action under Code of Civil Procedure, Section 731, to abate a theatrical performance on the ground that it was a public nuisance. The complaint alleged that under a concession granted by the Panama-California International Exhibition, the defendant was conducting upon the exposition grounds a public resort and place of amusement and entertainment, known as the "Sultan's Harem", in which certain women did make in the presence of the general public a public exhibition and exposure of their naked person and private parts, which performance was alleged to be indecent and offensive to the senses and a public nuisance. The California court dismissed the defendant's application for a preemptory writ holding the action was properly brought. At page 465, the court said:

> "While the acts here complained of clearly constitute a crime, *they also constitute a nuisance within the meaning of Section 3479 of the Civil Code*, which defines a nuisance as 'anything which is . . . indecent or offensive to the senses

. . . so as to interfere with the comfortable enjoyment of life or property. . . .' (Emphasis ours.)

"And Section 3480 of the same Code defines a public nuisance as: 'One which affects at the same time an entire community or neighborhood, or any considerable number of persons, although the extent of the annoyance or danger inflicted upon individuals may be unequal.'

"Mr. Joyce in his work on Nuisances, Section 409, says: 'A disorderly and disreputable theater may be enjoined, although a common nuisance.'

"To the same effect is Wood on Nuisances, Section 68, where it is said: 'A public exhibition of any kind that tends to the corruption of morals, to a disturbance of the peace, or of the general good order and welfare of society, is a public nuisance. Under this head are included . . . obscene pictures and any and all exhibitions, the natural tendency of which is to pander to vicious . . . and disorderly members of society.'" (our emphasis)

The *Weis* decision and rationale was cited with approval by the California Supreme Court in *People v. Lim*, 18 Cal. 2d 872, 118 P. 2d 472 (Nov. 27, 1941). In the *Lim* case, the California Supreme Court noted, at page 476:

"Similarly in Weis v. Superior Ct., 30 Cal. App. 730, 159 P. 464, it was held that the District Attorney of San Diego County was authorized under Code of Civil Procedure, Section 731, to enjoin the performance of a public exhibition which was shown to have been indecent, and thus within the statutory definition of public nuisances

in Civil Code Section 3749. . . . The courts have thus refused to grant injunctions on behalf of the state *except where the objectionable activity can be brought within the terms of the statutory definition of public nuisance. . . .*" (Our emphasis.)

2. *The Proscription of Obscenity Either Separately or Incident to a "Breach of the Peace" violation Is Grounded Upon the Legitimate Governmental Aim of Controlling and Regulating "Public Morality" i.e., Public Conduct, Which Affects the People as a Whole.*

Obscenity controls do not attempt to reach *private morality* such as what a person may read or see. The proscription of obscenity is grounded upon the legitimate governmental aim of controlling and regulating "*public morality*"—public conduct, which affects the people as a whole.

Law and morality are not identical. Although interrelated, they are necessarily distinct. Not every moral evil is proscribed by man-made laws. *Public* morality is to be distinguished from *private* morality, as to which it is often said, the law does not concern itself. On the other hand, our law has always recognized the importance of maintaining a high *public* morality.

Nowhere was the function of such "vice" laws more clearly stated than in the arguments of the prosecutor two and one-half centuries ago in the first obscenity conviction in *Rex v. Curl*, 2 Strange 789 (1727) (See Point IB herein):

"3. As to Morality. Destroying that is destroying the peace of the government for govern-

ment is no more than public order, which is morality. My Lord Chief Justice Hale used to say Christianity is part of the law, and why not morality too? I do not insist that every immoral act is indictable, such as telling a lie, or the like; *but if it is destructive of morality in general, if if does, or may, affect all the King's subjects, it then is an offense of a public nature. And upon this distincition it is that particular acts of fornication are not punishable in the Temporal Courts* (Common Law courts) *and bawdy houses are.* In Sir Charles Sedley's case it was said, that this Court is the custos-morum of the King's subjects. 1 Sid. 168." (Our empahsis).

Louis B. Schwartz, co-reporter of the Model Penal Code, explains the governmental function of the obscenity crime in society as follows, in 63 Columbia Law Review, Morals Offenses, and the Model Penal Code (cited by this Court with approval in *Ginzburg v. U.S.*, 16 L. Ed. 2d 38, fn. 12; page 39, fn. 14, page 41, fn. 19; *Mishkin v. N.Y.*, 16 L. Ed. 2d 53, fn. 9; and *Stanley*, 394 U.S. 557, fn. 10) at page 671:

> "But the great majority of people believe that the morals of the 'bad' people do, at least in the long run, threaten the security of the 'good' people. . . . It is hard to deny people the right to legislate on the basis of their beliefs not demonstrably erroneous, especially if these beliefs are strongly held by a very large majority. The majority cannot be expected to abandon a credo, and its associated sensitivities, however irrational, in deference to a minority's skepticism."

And at page 672:

> "If unanimity of strongly held moral views is approached in a community, the rebel puts himself, as it were, outside the society when he arranges himself against those views . . . the community cannot be expected to make (his) first protests respectable or even tolerated by the law. . . ."

Mr. Schwartz continues, at page 681:

> "But equally, it is not merely sin-control of the sort that evoked Professor Henkin's constitutional doubts. Instead, the community is merely saying, 'Sin, if you must, in private. Do not flaunt your immoralities where they will grieve and shock others. If we do not impose our morals upon you, neither must you impose yours upon us, undermining the restraint we seek to cultivate through family, church, and school.' *The interest being protected is not* directly or exclusively, the souls of those who might be depraved or corrupted by the obscenity, *but the right of parents to shape the moral notions of their children, and the right of the general public not to be subjected to violent psychological affront.*" (Our empahsis).

None of the above authorities require that the obscene or lewdness which is being proscribed must be "erotic" as the majority opinion concludes. On the contrary, Mr. Schwartz notes at page 678:

> "It is important to recognize that material may predominantly 'appeal' to prurient interest notwithstanding that ordinary adults may actually respond to the material with feelings of aversion or

> disgust. Section 251.4 explicitly encompasses material dealing with excretory functions as well as sex, which the customer is likely to find *both* repugnant and 'shameful' and yet attractive in a morbid, compelling way . . ."

Concerning the power of government to regulate matters relating to *public morals* and power to say what is offensive to *public morality,* the United States Supreme Court said in *Mugler v. Kansas,* 123 U.S. 623 (1887):

> "The power to determine such questions (what is offensive to public morality) so as to bind all, must exist somewhere; else society will be at the mercy of the few, who, regarding their own appetites or passions, may be willing to imperil the peace and security of many, provided only they are permitted to do as they please. *Under our system, that power is lodged in the legislative branch of the government.* It belongs to that department to exert what are known as police powers of the state, *and to determine primarily, what measures are appropriate or needful for the protection of the public morals,* the public health, or the public safety. . . ." (Our emphasis.)

In 1705 Alexander Pope wrote in simple verse in his quatrain "The Monster Vice", why such vices must be proscribed if good morality is to be maintained:

> "Vice is a monster of so frightful mien,
> As, to be hated, needs but to be seen;
> Yet seen too oft, familiar with her face,
> We first endure, then pity, then embrace."

See also, Federal District Judge Peirson Hall speaking on "The Monster Vice" in *U.S. v. Four (4) Books,* 289 F.Supp. 972, at 973 (Sept. 10, 1968).[2]

The existence of the vice of obscenity and lewdness is the symptom of a disorder which probability tells us, will lead to ruin. Arnold Toynbee, the historian, tells us that 19 out of the 21 great civilizations which flourished in world history, crumbled into ruin . . . not because of armed aggression from without but because of moral decay from within. In 1874 Justice Swayne, speaking for an unanimous United States Supreme Court in *Trist v. Child,* 21 Wallace 441, 450 (1874) had the following to say about the nature of the underpinnings of this Nation:

> "The foundation of a republic is the virtue of its citizens. They are at once sovereigns and subjects. As the foundation is undermined, the structure is weakened. When it is destroyed, the fabric must fall. Such is the voice of history. . . ."

In sum, the case for affirmance of the governmental action herein was stated by the United States Supreme Court Justice Harlan in his concurring opinion in *Roth v. U.S.*, 354 U.S. 476, 77 S. Ct. 1304, 1 L. Ed. 2d 1498 (June 22, 1957), at page 502:

> "The state can reasonably draw the inference that over a long period of time the indiscriminate dissemination of materials, *the essential character of which is to degrade sex,* will have an eroding effect on moral standards. . . ." (Our emphasis).

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[2]This Court's suggestion that the conduct and four letter words in *Cohen* (*supra*) and *Goldberg* (*supra*) and the conduct and combination of words in *Ceci* (*supra*) have attained constitutional protection lends credence to Judge Hall's suggestion that this Court is being seduced by the increasing amount of pornographic materials it is requiring be placed before it.

## Conclusion.

This case should be ordered restored to the docket for reconsideration by way of briefing and further argument on the limited jurisdictional question delineated in Point IC herein, namely: whether the Court of Appeal's construction of the term "offensive conduct" as employed in Penal Code section 415 to encompass lewd displays of language in the corridors of the Court House where women and children were present, as applied to the facts of this case, was an infringement on the individual rights of Appellant as guaranteed by the First and Fourteenth Amendments to the Federal Constitution. In the alternate, this Court's opinion in the case herein should be recalled and the appeal should be dismissed for want of a substantial federal question.

Respectfully submitted,

CHARLES H. KEATING JR.,
*Amicus Curiae.*

KEATING, CLANCY, BERTSCH &
JOHNSTON,
*Of Counsel.*

## APPENDIX A.

June 18, 1969

The Clerk
Georgia Supreme Court
Courthouse
Atlanta, Georgia 30300

Dear Sir:

A copy of "Memorandum on Stanley v. Georgia" is enclosed as being of possible academic interest to the Justices of the Georgia Supreme Court, who sat in the Stanley case, recently reversed by the United States Supreme Court.

Yours very truly,

Counsel, Citizens for
Decent Literature, Inc.

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### MEMORANDUM ON STANLEY v. GEORGIA

The attached Petition for Rehearing in Stanley v. Georgia was prepared by CDL but was not filed in the Stanley case. Before an amicus brief can be considered, a Petition for Rehearing must be on file with the U.S. Supreme Court. Lewis R. Slayton, the District Attorney of Atlanta, was unwilling to file a Petition for Rehearing.

The amicus curiae brief was submitted to the Atlanta District Attorney, who was asked to draw in issue the contraband matter. His feelings against the U.S. Supreme Court were so strong, he said he would not give them an opportunity to rule against him further. There is a reasonable justification for his stand on this matter.

Although there is only a snowball in hell chance in any petition for a rehearing in the U.S. Supreme Court, and probably no better probability that Justices Harlan and Warren would be pulled over to the reasoning of Justices Brennan, White and Stewart, there was some merit in getting these contentions before Justices Harlan and Warren to see if they really understood the opinion that they had subscribed to. There was real merit, however, in carrying the issue back over to the Georgia Supreme Court on remand of that case to that court. If the Georgia Supreme Court had on its own initiative seized the bull by the horns and following Wisconsin v. Voshart, ordered the destruction of the film as contraband in a reported decision, the rationale in Justice Thurgood Marshall's opinion could have been undermined.

Counsel, Citizens for
Decent Literature, Inc.

June 18, 1969

In the Supreme Court of the United States.

October Term 1968, No. 293.

Robert Eli Stanley, Appellant, vs. State of Georgia, Appellee.

AN APPEAL FROM THE SUPREME COURT OF GEORGIA

PETITION FOR REHEARING

Appellee, State of Georgia, prays that a rehearing be granted of this Court's decision of April 7, 1969, herein, reversing the judgment of affirmance by the Supreme Court of Georgia, dated April 9, 1968, and that the case be ordered restored to the docket for argument on the following questions presented by the jurisdictional statement and the opinion of the Court:

1. Whether a State may, within the limits set by the Federal Constitution, punish as a criminal act the simple possession of obscene materials;

2. Independent of the former consideration, whether a State may, within Federal constitutional limitations, declare such materials to be contraband and subject to forfeiture as against an individual's claim to a right of property therein;

3. Whether a State officer, acting in concert with Federal agents executing a valid Federal search warrant issued for failure to register as a gambler, were constitutionally authorized to examine the contents of three motion picture films not described in the warrant and not related to the investigation therein, which were concealed in a desk drawer of appellant's home.

Dated:

Attorney for Appellant

## REASONS FOR GRANTING REHEARING AND RESTORING CASE TO DOCKET FOR RE-ARGUMENT

### I.

***The Majority Opinion Is In Error in Holding That An Individual Has A Personal Right, Superior To That Of The State "To Read", "To Possess", And To Satisfy One's "Emotional Needs" With Obscene Motion Picture Films, Under Circumstances Where The State Legislature Has Acted To Treat Such Materials as Corruptive Of The Common Good And Not Subject to Lawful Ownership (Contraband).***

The majority opinion analysis fails to take into consideration the fact that there are two separate and distinct principles involved in the Georgia legislation. Stated as issues they are:

1. May a State, within the limits set by the Federal Constitution, punish as a criminal act the simple possession of obscene materials, and

2. *Independent of the former consideration,* may a State, within Federal Constitutional limitations, declare such materials to be contraband and subject to forfeiture as against an individual's claim to a right of property therein?

The distinction between these two issues is the difference between (1) a criminal law motion to suppress such materials as evidence in the criminal trial, and (2) a motion made at the same time or later, based upon property rights, to restore the ownership of such property as against a claim of forfeiture by the State as contraband. In its decision on the first

issue denying the State of Georgia the right to exact a criminal law penalty based upon simple possession, the language of the majority opinion runs aground for, among other reasons, lack of attention to the concomitant property law questions present in the second issue. Without having considered the matter in depth, this Court's rationale draws in question the right of Georgia to destroy the obscene motion picture films as contraband and to regard the same as not subject to lawful ownership.

As far as amicus is able to determine, there is nothing flowing from any case law interpreting the Federal Constitution which accords to an individual a property right superior to that of the community relative to the possession of obscene motion picture films. Nevertheless, this Court's reasoning on the criminal law issue dealing with "simple possession" seems to accord to the defendant a property right in defeasance of the State's declared public policy that obscene motion picture films are not subject to ownership and are contraband as a matter of law. The majority language in this regards reads as follows:

> "It is now well established that the Constitution protects the right to receive information and ideas. *'This freedom (of speech and press) . . . necessarily protects the right to receive. . . .' This right to receive information and ideas, regardless of their social worth,* see Winters v. New York, 333 U.S. 507, 510 (1948), is fundamental to our free society. . . .
>
> "These are the rights that appellant is asserting in the case before us. *He is asserting the right to satisfy his* intellectual and *emotional needs* in the

privacy of his own home. He is asserting the right to be free from state inquiry into the contents of his library. *Georgia contends that appellant does not have these rights, that there are certain types of materials that the individual may not . . . even possess.* Georgia justifies this assertion by arguing that the films in the present case are obscene. *But we think that mere categorization of these films as 'obscene' is insufficient justification for such a drastic invasion of personal liberties guaranteed by the First and Fourteenth Amendments. . . .*" (Our emphasis.)

Unless the rationale of Roth-Alberts is to be completely disregarded, the reasoning of this Court on the property rights involved is clearly in error and for the following reasons:

This Court's opinion in Stanley was not written in a vacuum as the above language would suggest, nor may this Court treat the same as such. United States v. Raines, 362 U.S. 17, 21 (1960) stands for the contrary proposition:

> "This Court, as in the case of all Federal Courts, 'has no jurisdiction to pronounce any statute, either of a state or of the United States void, because irreconcilable with the Constitution, except as it is called upon to adjudicate the legal rights of litigants in actual controversies. In the exercise of that jurisdiction, it is bound by two rules, to which it has rigidly adhered, one, never to anticipate a question of constitutional law in advance of the necessity of deciding it: the other, never to formulate a rule of constitutional law broader

than is required by the precise facts to which it is to be applied.' Liverpool, New York & Philadelphia S.S. Co. v. Commissioners of Immigration, 113 U.S. 33, 39. Kindred to these rules is the rule that one to whom application of a statute is constitutional will not be heard to attack the statute on the ground that impliedly it might also be taken as applying to other persons or other situations in which its application might be unconstitutional. U.S. v. Wurzbach, 280 U.S. 396."

The language of the majority opinion in Stanley, objected to above, and the whole of that majority opinion is premised upon one fundamental fact—*the three motion picture films which are the subject of this Court's concern are under prevailing constitutional standards uncontrovertibly obscene as a matter of law*. The Atlanta District Attorney refers to them as stag films (Appellee Brief on the Merits, at pages 18, 19) and describes their contents as:

"These films . . . are not literature in any sense of the word. They contain no plot, no dialogue, no moral lesson, no insight into contemporary social customs or mores, or any other redeeming social value. They are . . . only for lustful private showings . . . . They consist of nothing except close-up scenes of seduction, display of male and female genitalia and pubic regions, oral sodomy and sexual intercourse in a variety of positions. Thus we feel the films are pure obscenity. . . ."

This Court and the litigants were unanimous in their agreement that the District Attorney's evaluation was correct. At footnote 2, the majority opinion under-

pinned its rationale upon an acknowledgment that the films were obscene as a matter of law:

> "Appellant does not argue that the films are not obscene. *For the purpose of this opinion, we assume that they are obscene under any of the tests. . . .*" (Our emphasis.)

The Court having adopted this premise, there is much more concerning the nature[1] of the motion picture films which, under Ruling Case Law, is not open to question or the proper subject of debate by this Court. By their nature, it must follow that the subject motion picture films (1) are utterly without redeeming social importance, and (2) are without First Amendment protection because they are utterly without redeeming social importance. In 1957 the majority in Roth-Alberts viewed this as being in the order of a "universal judgment". The paramount interest *then* was the Government's interest in "order and morality". See 354 U.S. 576, at 585, where the Roth court said:

> "But implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance. This rejection for that reason is mirrored in the universal judgment that obscenity should be restrained, reflected in the international agreement of over 50 nations, in the obscenity laws of all of the 48 states, and in the 20 obscenity laws enacted by the Congress from

[1]The majority opinion consistently seeks to distinguish the facts in Stanley from those in Roth-Alberts so as to disengage itself from the limits imposed by the latter decision. While the fact of simple possession in Stanley may be distinguished from the fact of commercial possesssion in Roth-Alberts, no such distinction can be drawn to avoid the specific holding in Roth regarding the nature of obscene materials, i.e., their lack of tangible worth.

1842 to 1956. This is the same judgment expressed by this Court in Chaplinsky v. New Hampshire, 315 U.S. 568, 571, 86 L.Ed. 1031, 1035, 62 S.Ct. 766:

> " 'There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any constitutional problem. These include the lewd and obscene. . . . It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such light social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality. . . .'
>
> "We hold that obscenity is not within the area of constitutionally protected speech nor press."

This Court cannot avoid the Roth language above, which places materials which are obscene *as a matter of law* in the same class of property as "narcotics", "firearms", or "stolen goods". Such materials may be regarded by government as incapable of ownership and subject to forfeiture. Nevertheless, this Court at footnote 11 draws a distinction without reason other than "First Amendment rights are involved" . . . yet this was the very opposite premise adopted by the Court at the start of its opinion.

If the above rationale in Roth-Alberts is still the law, it can hardly be said that a State under the powers reserved to it by the Ninth and Tenth Amendments may not, within constitutional limits, declare such matters to be incapable of ownership and contraband, as against an individual personal claim to a right of own-

ership. In this light, it seems inescapable to amicus that the language of the majority opinion reading:

> "But we think that mere categorization of these films as 'obscene' is insufficient justification for such a drastic invasion of personal liberties guaranteed by the First and Fourteenth Amendments"

is clearly erroneous.

We further believe that the Court's invocation of "First and Fourteenth Amendment" rights is not justified. The concurring opinion of Stewart, Brennan, and White correctly labels the constitutional principle involved in this case. If simple possession (without more) of motion picture films which are obscene as a matter of law may not be made a crime, it must turn on the Fourth Amendment right to privacy which is a right to one's solitude. This right to one's solitude is the antithesis of the First Amendment right which is a right to communicate with others (free speech and press). At least under this analysis, the Court does not find itself in the unconscionable position of reconstructing the positive values reaffirmed over 12 years ago in the Roth-Alberts opinion.

The right of government to destroy obscene motion picture films as contraband as against the claims of an individual to possession thereof was recently before the Wisconsin Supreme Court in State v. Voshart, 159 N.W. 2d 1 (June 7, 1968), on almost identical facts. There, certain motion picture films had been seized under a search warrant and their possessor charged with two counts of obscenity: (1) intentionally having in his possession obscene motion picture film (simple possession) and (2) intentionally having in his possession such film for sale or exhibition (commercial possession). In Voshart however, the trial court granted a motion to

suppress the evidence based upon the invalidity of the search warrant the criminal complaint against him was dismissed as to both counts. Following dismissal of the criminal charge, the defendant filed a motion for return of the obscene motion picture films and the State moved for destruction of the film as contraband. As here, it was conceded that the film was obscene. The Wisconsin Supreme Court in ruling upon the petitioner's claim to a right of possession adopted the reasoning of the Wisconsin trial court, at page 10:

> "It seems very clear to us that when contraband articles . . . to which no one can have a property right, are found in an illegal search, they should not be returned to the persons from whom they were taken. . . ."

Unlike the majority of this Court, the Wisconsin Supreme Court did not recognize any superior right in an individual "to read", "to possess", and to satisfy one's "emotional needs" with obscene motion picture films. Instead the Court adopted what amicus feels is the only course open in our Judeo-Christian Anglo Saxon tradition, namely, at page 9:

> "Under its police powers, as a matter of public policy, the Legislature may declare to be contraband property that menaces public health, safety and morals. The right to destroy contraband property includes property such as counterfeit money, diseased cattle, contaminated food, and gambling devices. We would sustain the right of the Legislature to place obscene materials in this same category. This is not a case of an innocent article put to an illegal use. It is as impossible to separate the contamination from the flood or the gambling from the device. . . ."

## II.

***The Philosophy Espoused by the Majority Opinion Undermines Roth-Alberts and Is Destructive of Public Morals.***

This Court is sorely in need of a moral voice in the tradition of the late Associate Justice Noah H. Swayne of the United States Supreme Court:

> "The foundation of a republic is the virtue of its citizens. They are at once sovereigns and subjects. As the foundation is undermined, the structure is weakened. When it is destroyed, the fabric must fall. Such is the voice of universal history. The theory of our Government is, that all public stations are trusts, and that those clothed with them are to be animated in the discharge of their duties solely by considerations of right, justice, and the public good. They are never to descend to a lower plane. . . ." Associate Justice Noah H. Swayne speaking in Trist v. Child, 21 Wallace 441 (1874).

Or Justice Radcliffe of the Ohio Supreme Court:

> "There is an oft-quoted cliche to the effect that it is not possible to legislate in the field of morals. The statement originally was and still should be 'it is not possible to legislate morality for the people.' We sorrowfully agree that this is so, but the impossibility of accomplishing that which is good for all the people should not and must not be used as an excuse for failing to tray. History is replete with examples of nations that lost positions of eminence in the world and whose citizens lost their freedom due to decay of their moral fibre resulting in degeneracy and depravity. Legislative

bodies must continue to pass laws which attempt to protect the morality of the people from themselves and from their own weaknesses. When such laws are rejected it should be by those governed, either by repudiating their legislators, by failing to reelect or by direct referendum. It is infelicitous for the judicial branch of the Government to seek for constitutional infirmities which enable courts to thwart the actions of that segment of government closest to the governed and directly responsive and responsible thereto. By its very nature, the judiciary is farthest from the people because of the length of tenure of mode of selection, consequently its authority must be exercised with deliberate caution. Lex citus tolerare vult privatum damnum quam publican malum (The law will rather permit a private loss or damage than a public evil)." Justice Radcliffe speaking for the Supreme Court of Ohio in State of Ohio v. Jacobellis, Jan. 17, 1962.

Or the late Justice W. Turney Fox of the California District Court of Appeal:

"The effect of such 'literature' is to dull the moral sensitivity of many, if not most of the people who read it. It serves to erode our moral standards and tends to bring about the moral decay of our people. If the time ever comes when the average person, applying contemporary standards, does not look upon such a book as detrimental to the public welfare, it will be a signal that our society has deteriorated to a low level and that our civilization is in danger of collapsing as other civilizations have in the past which have over-indulged their appetites

and cast aside decent standards of behavior." Justice Fox speaking for the District Court of Appeal in People of the State of California v. Williamson, 24 Cal. Rptr. 734 (Sept. 26, 1962).

Or the late Associate Justice Michael A. Musmanno of the Pennsylvania Supreme Court:

"Prohibition against obscenity is not only a matter of cleanliness and godliness; the health of the community is involved. It has been established in thousands of cases that there can be a direct connection between abnormal sex books and sex crimes. Those who profess not to see this connection are either abysmally ignorant or refuse to accept the truth. . . .

"Why have there been laws against obscenity reaching back into the days of antiquity? It is because obscenity, lewdness, lasciviousness strikes at the very moral fibre of the people and, when that disintegrates, a nation perishes. Justice Harlan said in the Roth-Alberts case . . . that 'the state can reasonable draw the inference that over a long period of time the indiscriminate dissemination of materials, the essential character of which is to degrade sex, will have an eroding effect on moral standards.' We know that Rome was great and went into decline; that Greece was the flower of culture, and that weeds finally grew in the Acropolis; that the Persian, Egyptian, Babylonian and numerous other civilizations were powerful, rich and indominable but something happened to them and they moldered into decay, not because of armed invasions from without their gates, but from moral deterioration within their

> own walls. . . . ." Associate Justice Michael A. Musmanno dissenting in Commonwealth of Pa. v. Del Publications, Inc., 233 Atl.2d 840 (June 29, 1967).

For lack of the same, we find the rankest order of obscenity inundating this Nation and reproducing itself out of the fission set into motion by this Court's obscenity decisions. The demoralizing force that obscenity exudes is everywhere. It fills our novels, paperbacks, still pictures, magazines and phonograph records, and has spilled over into and flooded our motion picture films, drama, beer bars, nightclub acts, campus dialogue and campus newspapers.

More disturbing to amicus than this Court's interference with the sincere efforts of the State of Georgia to meet this problem is the tenor of the language and philosophy supporting the majority opinion. It is our firmly held conviction that the No. 1 cause of this Nation's present monumental obscenity problem is the continuing refusal, as here, of certain members of this Court to accept the basic Judeo-Christian, Anglo Saxon philosophy which underpins the Roth-Alberts decision. We did not believe that Justice Harlan and Justice Warren, both of whom concurred in Roth-Alberts and have given support to the people's cause, could bring themselves to join in all the opinion said.

There is a very determined campaign afoot in this Court to diminish and avoid the Roth holding, a movement which is contrary to the overwhelming sentiment of the state legislatures, juries and courts which make up this Nation. The Kentucky Court of Appeals succinctly expressed this sentiment in its recent decision

in Cain v. Commonwealth of Kentucky, ..... Ky. ..... (Feb. 14, 1969):

> "The Supreme Court of the United States held in the Roth case that obscenity is not protected by the First and Fourteenth Amendments to the Constitution of the United States. As far as we have been able to determine, this holding has never been reversed or modified. The Court has occupied itself since that ruling in a somewhat futile attempt to determine what is obscene and what is not obscene. This problem has given the judiciary of this country the greatest challenge of its history and as of the date of this opinion the judicial record reflects nothing more than indecision and failure.
>
> "While the courts have vascillated and overexplained, divided and fought, the sentiments of the people of this country have been clear and unassailable. . . . *It seems to be universally believed everywhere, except in the halls of the judiciary, that obscenity as such is not entitled to the constitutional protection awarded free speech.*
>
> "Many times the right to pose a question is tantamount to the right to answer or at least partially so. Down through the years we have been asking ourselves when dealing with pornography and obscenity, 'is it harmful'. Of course this answer cannot come without a certain amount of reservation because the proof is hard to come by and often inconclusive. Therefore, we keep asking the same question and getting th same answers with reservations. If we were to change the form of the question asked 'is it beneficial', the answer would come loud and clear. Certainly no

benefit can come to any individual or any society by the use of dissemination of pornographic and obscene material. *This being so, why should we longer expend the time and energy of the greatest minds of this country in preserving its presence upon the newsstands and in the theaters?* It is our opinion that the jury had sufficient evidence before it to hold the film obscene." (Emphasis ours.)

In undercutting the Georgia Supreme Court decision to uphold the will of the State Legislature and findings of the jury as they relate to the facts in this case, the majority employs language which strikes at the very root of the Roth-Alberts decision. In this regard, the majority opinion says:

> "And yet, in the face of these traditional notions of individual liberty, Georgia asserts the right to protect the individual's mind from the effects of obscenity. We are not certain that this argument amounts to anything more than the asserting that the state has the right to control the moral content of a person's thoughts."

We fail to see why the majority should think it so incredulous that one would assert that the state has the right to legislate so as to control the moral content of a person's thoughts in matters relating to sexual morality. See the opinion of Justice Ratcliffe speaking in Jacobellis v. Ohio (supra). This was the very issue argued and decided in Roth-Alberts. The Roth-Alberts Court approved a jury instruction in Roth which read: "Obscene, Lewd and lascivious as used in the law, signified that form of immorality which has relation to sexual impurity and has a tendency to excite lust-

ful thoughts." It also approved the Alberts' test for obscenity, namely, "Whether the material has a substantial tendency to deprave or corrupt its readers by exciting lascivious thoughts or arousing lustful desires." It is for this very reason that the State of Wisconsin declared obscene materials to be contraband and subject to forfeiture. Wisconsin v. Voshart, 159 N.W.2d 1, 9. Recognizing that obscenity is a menace to the public health and morals, the Wisconsin Supreme Court acted in the interests of the common good to deprive Mr. Voshart of what communications such obscene motion picture films had to offer to him personally.

Continuing along this line of reasoning, the majority opinion in Stanley collaterally attacks the Roth-Alberts foundations:

> "To some, this may be a noble purpose, but it is wholly inconsistent with the philosophy of the First Amendment. As the Court said in Kinglsey International Pictures Corp. v. Regents, 360 U.S. 684, 688 (1959), 'This argument misconceives what it is that the Constitution protects. Its guarantee is not confined to the expression of ideas that are convention or shared by a majority . . . and in the realm of ideas it protects expression which is eloquent no less than that which is unconvincing.' Cf. Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952). Nor is it relevant that obscenity in general, or the particular films before the Court, are arguably devoid of any ideological content. The line between the transmission of ideas and mere entertainment is much too elusive for this Court to draw, if indeed such a line can be drawn at all. See Winters v. N.Y., supra, 333 U.S. at 510."

The effect of such an interpretation is to breed the ideas expressed by Justice Stewart's opinion in Kingsley International Pictures, Inc. v. Regents, 360 U.S. 680 (which the majority interpret as guaranteeing *every* expression—including, by inference, those which "deprave or corrupt its readers by exciting lascivious thoughts or arousing lustful desires") to a first impression interpretation of First Amendment rights (which the majority interpret as guaranteeing the reception of every such expression) to arrive at a progeny which most assuredly contravenes the Roth-Alberts principle.

We cannot understand how Justice Harlan could bring himself to join in Justice Thurgood Marshall's opinion, where, its language expressed above, is at odds with what he has been saying these past 12 years, beginning with Roth-Alberts, supra, and extending to Interstate Circuit, Inc. v. Dallas, 20 L.Ed.2d 225 at 245 (Apr. 22, 1968). Its philosophy is a complete negation of his expressions in Roth-Alberts at page 501:

> "I concur in the judgment of the Court in No. 61, Alberts v. California.
>
> "The question in this case is whether the defendant was deprived of liberty without due process of law when he was convicted for selling certain materials found by the judge to be obscene because they would have a 'tendency to deprave or corrupt its readers by exciting lascivious thoughts or arousing lustful desire.'

"In judging the constitutionality of this conviction, we should remember that our function in reviewing state judgment under the Fourteenth Amendment is a narrow one. We do not decide whether the policy of the state is wise, or whether it is based on assumptions scientifically substantiated. We can require only whether the state action so subverts the fundamental liberties implicit in the due process clause that it cannot be sustained as a rational exercise of power. . . .

"What, then, is the purpose of this California statute? Clearly the State Legislature has made the judgment that printed words *can* 'deprave or corrupt' the reader—that words can incite to antisocial or immoral action. The assumption seems to be that the distribution of certain types of literature will induce criminal or immoral sexual conduct. It is well known, of course, that the validity of this assumption is a matter of dispute among critics, sociologists, psychiatrists, and penologists. There is a large school of thought, particularly in the scientific community, which denies any causal connection between the reading of pornography and immorality, crime or delinquency. Others disagreed. Clearly it is not our function to decide this question. That function belongs to the State Legislature. Nothing in the Constitution requires California to accept as truth the most advanced and sophisticated psychiatric opinion. It seems to me clear that it is not irrational in our present state of knowledge to consider that pornography can induce a type of secual conduct which a state may deem obnoxious to the moral fabric of society. In fact the very division of opin-

ion on this subject counsels us to respect the choice made by the state.

"Furthermore, even assuming that pornography cannot be deemed ever to cause, in an immediate sense, criminal sexual conduct, other interests within the proper cognizance of the state may be protected by the prohibition placed on such materials. The state can reasonably draw the inference that over a long period of time the indiscriminate dissemination of materials, the essential character of which is to degrade sex, will have an eroding effect on moral standards. . . .

"Since the domain of sexual morality is preeminently a matter of state concern, this Court should be slow to interfere with state legislation calculated to protect that morality. It seems to me that nothing in the broad and flexible command of the due process clause forbids California to prosecute one who sells books whose dominant tendency might be to 'deprave or corrupt' a reader."

Assuming Justice Harlan would be satisfied with the state action in Wisconsin v. Voshart, which would destroy the films as contraband, we ask whether he can adhere to this Stanley majority opinion and still reconcile its language with the Voshart reasoning.

Having succeeded in undermining the Roth foundation in the above collateral attack, the majority opinion proceeds to directly attack Roth-Alberts by downgrading its importance. The majority language reads:

"Whatever may be the justification for other statutes regulating obscenity. . . ." and

"Whatever the power of the state to control public dissemination of ideas innimicable to the public morality. . . ." and

"It is true that in Roth this Court rejected the necessity of proving that exposure to obscene material would create a clear and present danger of antisocial conduct or would probably induce its recipients to such conduct. . . . (354 U.S. at 486, 487) But that case dealt with public distribution of obscene materials and such distribution is subject to different objections."

We recognize that under our Anglo Saxon criminal law a traditional distinction is drawn between those community police actions which are necessary to the common goods, and others which cannot be so classified, being purely and simply an interference with private sins.

This proposition has seldom been so ably stated as by the English court in Rex v. Curl, 3 Q.D.D. 619 (1727) dealing with the first obscenity crime in Anglo Saxon law:

"As to morality. Destroying that is destroying the peace of the Government, for Government is no more than public order, which is morality. My Lord Chief Justice Hale used to say, Christianity is part of the law, and why not morality too? I do not insist that every moral act is indictible, such as telling a lie or the like, but if it is destructive of morality in general, if it does, or it may affect all the King's subjects, it then is an offense of a public nature. And upon this distinction it is that particular acts of fornication are not punishable in the temporal courts, and bawdy houses are. . . ."

The majority opinion in Stanley, however, has absolutely none of the flavor of the prosecutor's arguments in Rex v. Curl.[2] To the contrary the majority opinion states:

> "More importantly, if the State is only concerned about literature inducing antisocial conduct, we believe that in the context of private consumption

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[2]Nor does the argument of the State of Georgia admit that this is a case of a simple "lie" or the fact of "fornification" discussed in *Rex v. Curl.* See Appellee's Brief on the Merits at pages 9 and 31:

> "Appellant made a very brief unsworn statement to the jury in which he said he is a bachelor, living alone and has a girl friend. He planned a Labor Day Party, invited several couples out, and a friend (whom he did not identify) came by and gave him three rolls of film, saying he wanted appellant to see it. Appellant said he put the film in a desk drawer and had completely forgotten about it until informed by the officers thay they were arresting him for it. . . ."
> "One of the cans of film bears the homemade and suggestive label 'Young Blood'. When the officers arrived two men were in appellant's backyard. While the search was in progress, another man and three women arrived at appellant's home. A table was set for eight and three dozen biscuits were ready for cooking. This added up to a total of seven persons, four men and three women, including appellant at his home that night (apparently one woman was tipped off that the party was off because of the presence of the officers and did not make her appearance). The film was scratched, dirty, and one reel was wound backwards, indicating recent viewing. Appellant made no comment whatever when told he was under arrest for the obscene film found upstairs. . . ."
> "His unsworn statement, together with reasonable inferences drawn therefrom, would support a finding that after he planned his Labor Day Party and invited several couples, someone (he said a friend—whom he did not identify) brought the films by with the suggestion that he would view them. The obvious inference is that they were to be shown at the party, to four couples, including himself. It is further a reasonable inference that he either would have viewed them himself prior to the party, or would have been informed by his generous friend of the general nature of the films. . . ."

Apparently the jury agreed with the Atlanta District Attorney, having elected not to recommend the matter be punished as a misdemeanor, as was its right under the law.

> of ideas and information we should adhere to the view that 'among free men, the deterents ordinarily to be applied to prevent crime are education and punishment for violations of the law' . . . given the present state of knowledge, the State may no more prohibit mere possession of obscenity on the grounds that it may lead to antisocial conduct than it may prohibit possession of chemistry books on the ground that they may lead to the manufacture of homemade spirits. . . ."

Amicus does not believe that innocent personal possession (personal sin) should be made a crime, but it would seem that, in view of the present state of proliferation of obscenity, even that choice should be left open to the State Legislature and State courts—especially where the subject matter is vile films of the sort herein considered. A step away from innocent personal possession is, in our view, possession with intent to show at "swinging" parties as argued here on the facts by the Atlanta District Attorney. Surely that is a matter of "public morals" within the cognizance of the criminal court. A simple analysis of the available means of establishing proof of either of these factual situations would seem to focus on the Fourth Amendment right to privacy, as the only constitutional right involved in such cases.

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# COHEN v. CALIFORNIA

APPEAL FROM THE COURT OF APPEAL OF CALIFORNIA, SECOND APPELLATE DISTRICT

No. 299. Argued February 22, 1971—Decided June 7, 1971

Appellant was convicted of violating that part of Cal. Penal Code § 415 which prohibits "maliciously and willfully disturb[ing] the peace or quiet of any neighborhood or person . . . by . . . offensive conduct," for wearing a jacket bearing the words "Fuck the Draft" in a corridor of the Los Angeles Courthouse. The Court of Appeal held that "offensive conduct" means "behavior which has a tendency to provoke *others* to acts of violence or to in turn disturb the peace," and affirmed the conviction. *Held:* Absent a more particularized and compelling reason for its actions, the State may not, consistently with the First and Fourteenth Amendments, make the simple public display of this single four-letter expletive a criminal offense. Pp. 22–26.

1 Cal. App. 3d 94, 81 Cal. Rptr. 503, reversed.

HARLAN, J., delivered the opinion of the Court, in which DOUGLAS, BRENNAN, STEWART, and MARSHALL, JJ., joined. BLACKMUN, J., filed a dissenting opinion, in which BURGER, C. J., and BLACK, J., joined, and in which WHITE, J., joined in part, *post*, p. 27.

*Melville B. Nimmer* argued the cause for appellant. With him on the brief was *Laurence R. Sperber.*

*Michael T. Sauer* argued the cause for appellee. With him on the brief was *Roger Arnebergh.*

*Anthony G. Amsterdam* filed a brief for the American Civil Liberties Union of Northern California as *amicus curiae* urging reversal.

MR. JUSTICE HARLAN delivered the opinion of the Court.

This case may seem at first blush too inconsequential to find its way into our books, but the issue it presents is of no small constitutional significance.

Appellant Paul Robert Cohen was convicted in the Los Angeles Municipal Court of violating that part of California Penal Code § 415 which prohibits "maliciously and willfully disturb[ing] the peace or quiet of any neighborhood or person . . . by . . . offensive conduct . . . ." [1] He was given 30 days' imprisonment. The facts upon which his conviction rests are detailed in the opinion of the Court of Appeal of California, Second Appellate District, as follows:

> "On April 26, 1968, the defendant was observed in the Los Angeles County Courthouse in the corridor outside of division 20 of the municipal court wearing a jacket bearing the words 'Fuck the Draft' which were plainly visible. There were women and children present in the corridor. The defendant was arrested. The defendant testified that he wore the jacket knowing that the words were on the jacket as a means of informing the public of the depth of his feelings against the Vietnam War and the draft.
>
> "The defendant did not engage in, nor threaten to engage in, nor did anyone as the result of his conduct

[1] The statute provides in full:

"Every person who maliciously and willfully disturbs the peace or quiet of any neighborhood or person, by loud or unusual noise, or by tumultuous or offensive conduct, or threatening, traducing, quarreling, challenging to fight, or fighting, or who, on the public streets of any unincorporated town, or upon the public highways in such unincorporated town, run any horse race, either for a wager or for amusement, or fire any gun or pistol in such unincorporated town, or use any vulgar, profane, or indecent language within the presence or hearing of women or children, in a loud and boisterous manner, is guilty of a misdemeanor, and upon conviction by any Court of competent jurisdiction shall be punished by fine not exceeding two hundred dollars, or by imprisonment in the County Jail for not more than ninety days, or by both fine and imprisonment, or either, at the discretion of the Court."

in fact commit or threaten to commit any act of violence. The defendant did not make any loud or unusual noise, nor was there any evidence that he uttered any sound prior to his arrest." 1 Cal. App. 3d 94, 97–98, 81 Cal. Rptr. 503, 505 (1969).

In affirming the conviction the Court of Appeal held that "offensive conduct" means "behavior which has a tendency to provoke *others* to acts of violence or to in turn disturb the peace," and that the State had proved this element because, on the facts of this case, "[i]t was certainly reasonably foreseeable that such conduct might cause others to rise up to commit a violent act against the person of the defendant or attempt to forceably remove his jacket." 1 Cal. App. 3d, at 99–100, 81 Cal. Rptr., at 506. The California Supreme Court declined review by a divided vote.[2] We brought the case here, postponing the consideration of the question of our jurisdiction over this appeal to a hearing of the case on the merits. 399 U. S. 904. We now reverse.

The question of our jurisdiction need not detain us long. Throughout the proceedings below, Cohen con-

[2] The suggestion has been made that, in light of the supervening opinion of the California Supreme Court in *In re Bushman*, 1 Cal. 3d 767, 463 P. 2d 727 (1970), it is "not at all certain that the California Court of Appeal's construction of § 415 is now the authoritative California construction." *Post*, at 27 (BLACKMUN, J., dissenting). In the course of the *Bushman* opinion, Chief Justice Traynor stated:

"[One] may . . . be guilty of disturbing the peace through 'offensive' conduct [within the meaning of § 415] if by his actions he wilfully and maliciously incites others to violence or engages in conduct likely to incite others to violence. (*People* v. *Cohen* (1969) 1 Cal. App. 3d 94, 101, [81 Cal. Rptr. 503].)" 1 Cal. 3d, at 773, 463 P. 2d, at 730.

We perceive no difference of substance between the *Bushman* construction and that of the Court of Appeal, particularly in light of the *Bushman* court's approving citation of *Cohen*.

sistently claimed that, as construed to apply to the facts of this case, the statute infringed his rights to freedom of expression guaranteed by the First and Fourteenth Amendments of the Federal Constitution. That contention has been rejected by the highest California state court in which review could be had. Accordingly, we are fully satisfied that Cohen has properly invoked our jurisdiction by this appeal. 28 U. S. C. § 1257 (2); *Dahnke-Walker Milling Co.* v. *Bondurant*, 257 U. S. 282 (1921).

I

In order to lay hands on the precise issue which this case involves, it is useful first to canvass various matters which this record does *not* present.

The conviction quite clearly rests upon the asserted offensiveness of the *words* Cohen used to convey his message to the public. The only "conduct" which the State sought to punish is the fact of communication. Thus, we deal here with a conviction resting solely upon "speech," cf. *Stromberg* v. *California*, 283 U. S. 359 (1931), not upon any separately identifiable conduct which allegedly was intended by Cohen to be perceived by others as expressive of particular views but which, on its face, does not necessarily convey any message and hence arguably could be regulated without effectively repressing Cohen's ability to express himself. Cf. *United States* v. *O'Brien*, 391 U. S. 367 (1968). Further, the State certainly lacks power to punish Cohen for the underlying content of the message the inscription conveyed. At least so long as there is no showing of an intent to incite disobedience to or disruption of the draft, Cohen could not, consistently with the First and Fourteenth Amendments, be punished for asserting the evident position on the inutility or immorality of the draft his jacket reflected. *Yates* v. *United States*, 354 U. S. 298 (1957).

Appellant's conviction, then, rests squarely upon his exercise of the "freedom of speech" protected from arbitrary governmental interference by the Constitution and can be justified, if at all, only as a valid regulation of the manner in which he exercised that freedom, not as a permissible prohibition on the substantive message it conveys. This does not end the inquiry, of course, for the First and Fourteenth Amendments have never been thought to give absolute protection to every individual to speak whenever or wherever he pleases, or to use any form of address in any circumstances that he chooses. In this vein, too, however, we think it important to note that several issues typically associated with such problems are not presented here.

In the first place, Cohen was tried under a statute applicable throughout the entire State. Any attempt to support this conviction on the ground that the statute seeks to preserve an appropriately decorous atmosphere in the courthouse where Cohen was arrested must fail in the absence of any language in the statute that would have put appellant on notice that certain kinds of otherwise permissible speech or conduct would nevertheless, under California law, not be tolerated in certain places. See *Edwards* v. *South Carolina*, 372 U. S. 229, 236–237, and n. 11 (1963). Cf. *Adderley* v. *Florida*, 385 U. S. 39 (1966). No fair reading of the phrase "offensive conduct" can be said sufficiently to inform the ordinary person that distinctions between certain locations are thereby created.[3]

In the second place, as it comes to us, this case cannot be said to fall within those relatively few categories of

[3] It is illuminating to note what transpired when Cohen entered a courtroom in the building. He removed his jacket and stood with it folded over his arm. Meanwhile, a policeman sent the presiding judge a note suggesting that Cohen be held in contempt of court. The judge declined to do so and Cohen was arrested by the officer only after he emerged from the courtroom. App. 18–19.

instances where prior decisions have established the power of government to deal more comprehensively with certain forms of individual expression simply upon a showing that such a form was employed. This is not, for example, an obscenity case. Whatever else may be necessary to give rise to the States' broader power to prohibit obscene expression, such expression must be, in some significant way, erotic. *Roth* v. *United States*, 354 U. S. 476 (1957). It cannot plausibly be maintained that this vulgar allusion to the Selective Service System would conjure up such psychic stimulation in anyone likely to be confronted with Cohen's crudely defaced jacket.

This Court has also held that the States are free to ban the simple use, without a demonstration of additional justifying circumstances, of so-called "fighting words," those personally abusive epithets which, when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke violent reaction. *Chaplinsky* v. *New Hampshire*, 315 U. S. 568 (1942). While the four-letter word displayed by Cohen in relation to the draft is not uncommonly employed in a personally provocative fashion, in this instance it was clearly not "directed to the person of the hearer." *Cantwell* v. *Connecticut*, 310 U. S. 296, 309 (1940). No individual actually or likely to be present could reasonably have regarded the words on appellant's jacket as a direct personal insult. Nor do we have here an instance of the exercise of the State's police power to prevent a speaker from intentionally provoking a given group to hostile reaction. Cf. *Feiner* v. *New York*, 340 U. S. 315 (1951); *Terminiello* v. *Chicago*, 337 U. S. 1 (1949). There is, as noted above, no showing that anyone who saw Cohen was in fact violently aroused or that appellant intended such a result.

Finally, in arguments before this Court much has been made of the claim that Cohen's distasteful mode of expression was thrust upon unwilling or unsuspecting viewers, and that the State might therefore legitimately act as it did in order to protect the sensitive from otherwise unavoidable exposure to appellant's crude form of protest. Of course, the mere presumed presence of unwitting listeners or viewers does not serve automatically to justify curtailing all speech capable of giving offense. See, *e. g., Organization for a Better Austin* v. *Keefe*, 402 U. S. 415 (1971). While this Court has recognized that government may properly act in many situations to prohibit intrusion into the privacy of the home of unwelcome views and ideas which cannot be totally banned from the public dialogue, *e. g., Rowan* v. *Post Office Dept.*, 397 U. S. 728 (1970), we have at the same time consistently stressed that "we are often 'captives' outside the sanctuary of the home and subject to objectionable speech." *Id.*, at 738. The ability of government, consonant with the Constitution, to shut off discourse solely to protect others from hearing it is, in other words, dependent upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner. Any broader view of this authority would effectively empower a majority to silence dissidents simply as a matter of personal predilections.

In this regard, persons confronted with Cohen's jacket were in a quite different posture than, say, those subjected to the raucous emissions of sound trucks blaring outside their residences. Those in the Los Angeles courthouse could effectively avoid further bombardment of their sensibilities simply by averting their eyes. And, while it may be that one has a more substantial claim to a recognizable privacy interest when walking through a courthouse corridor than, for example, strolling through Central Park, surely it is nothing like the interest in

being free from unwanted expression in the confines of one's own home. Cf. *Keefe, supra.* Given the subtlety and complexity of the factors involved, if Cohen's "speech" was otherwise entitled to constitutional protection, we do not think the fact that some unwilling "listeners" in a public building may have been briefly exposed to it can serve to justify this breach of the peace conviction where, as here, there was no evidence that persons powerless to avoid appellant's conduct did in fact object to it, and where that portion of the statute upon which Cohen's conviction rests evinces no concern, either on its face or as construed by the California courts, with the special plight of the captive auditor, but, instead, indiscriminately sweeps within its prohibitions all "offensive conduct" that disturbs "any neighborhood or person." Cf. *Edwards* v. *South Carolina, supra.*[4]

## II

Against this background, the issue flushed by this case stands out in bold relief. It is whether California can excise, as "offensive conduct," one particular scurrilous epithet from the public discourse, either upon the theory of the court below that its use is inherently likely to cause violent reaction or upon a more general assertion that the States, acting as guardians of public morality,

[4] In fact, other portions of the same statute do make some such distinctions. For example, the statute also prohibits disturbing "the peace or quiet . . . by loud or unusual noise" and using "vulgar, profane, or indecent language within the presence or hearing of women or children, in a loud and boisterous manner." See n. 1, *supra.* This second-quoted provision in particular serves to put the actor on much fairer notice as to what is prohibited. It also buttresses our view that the "offensive conduct" portion, as construed and applied in this case, cannot legitimately be justified in this Court as designed or intended to make fine distinctions between differently situated recipients.

may properly remove this offensive word from the public vocabulary.

The rationale of the California court is plainly untenable. At most it reflects an "undifferentiated fear or apprehension of disturbance [which] is not enough to overcome the right to freedom of expression." *Tinker* v. *Des Moines Indep. Community School Dist.*, 393 U. S. 503, 508 (1969). We have been shown no evidence that substantial numbers of citizens are standing ready to strike out physically at whoever may assault their sensibilities with execrations like that uttered by Cohen. There may be some persons about with such lawless and violent proclivities, but that is an insufficient base upon which to erect, consistently with constitutional values, a governmental power to force persons who wish to ventilate their dissident views into avoiding particular forms of expression. The argument amounts to little more than the self-defeating proposition that to avoid physical censorship of one who has not sought to provoke such a response by a hypothetical coterie of the violent and lawless, the States may more appropriately effectuate that censorship themselves. Cf. *Ashton* v. *Kentucky*, 384 U. S. 195, 200 (1966); *Cox* v. *Louisiana*, 379 U. S. 536, 550–551 (1965).

Admittedly, it is not so obvious that the First and Fourteenth Amendments must be taken to disable the States from punishing public utterance of this unseemly expletive in order to maintain what they regard as a suitable level of discourse within the body politic.[5] We

[5] The *amicus* urges, with some force, that this issue is not properly before us since the statute, as construed, punishes only conduct that might cause others to react violently. However, because the opinion below appears to erect a virtually irrebuttable presumption that use of this word will produce such results, the statute as thus construed appears to impose, in effect, a flat ban on the public utterance of this word. With the case in this posture, it does not seem inappro-

think, however, that examination and reflection will reveal the shortcomings of a contrary viewpoint.

At the outset, we cannot overemphasize that, in our judgment, most situations where the State has a justifiable interest in regulating speech will fall within one or more of the various established exceptions, discussed above but not applicable here, to the usual rule that governmental bodies may not prescribe the form or content of individual expression. Equally important to our conclusion is the constitutional backdrop against which our decision must be made. The constitutional right of free expression is powerful medicine in a society as diverse and populous as ours. It is designed and intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us, in the hope that use of such freedom will ultimately produce a more capable citizenry and more perfect polity and in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests. See *Whitney* v. *California*, 274 U. S. 357, 375–377 (1927) (Brandeis, J., concurring).

To many, the immediate consequence of this freedom may often appear to be only verbal tumult, discord, and

priate to inquire whether any other rationale might properly support this result. While we think it clear, for the reasons expressed above, that no statute which merely proscribes "offensive conduct" and has been construed as broadly as this one was below can subsequently be justified in this Court as discriminating between conduct that occurs in different places or that offends only certain persons, it is not so unreasonable to seek to justify its full broad sweep on an alternate rationale such as this. Because it is not so patently clear that acceptance of the justification presently under consideration would render the statute overbroad or unconstitutionally vague, and because the answer to appellee's argument seems quite clear, we do not pass on the contention that this claim is not presented on this record.

even offensive utterance. These are, however, within established limits, in truth necessary side effects of the broader enduring values which the process of open debate permits us to achieve. That the air may at times seem filled with verbal cacophony is, in this sense not a sign of weakness but of strength. We cannot lose sight of the fact that, in what otherwise might seem a trifling and annoying instance of individual distasteful abuse of a privilege, these fundamental societal values are truly implicated. That is why "[w]holly neutral futilities . . . come under the protection of free speech as fully as do Keats' poems or Donne's sermons," *Winters* v. *New York*, 333 U. S. 507, 528 (1948) (Frankfurter, J., dissenting), and why "so long as the means are peaceful, the communication need not meet standards of acceptability," *Organization for a Better Austin* v. *Keefe*, 402 U. S. 415, 419 (1971).

Against this perception of the constitutional policies involved, we discern certain more particularized considerations that peculiarly call for reversal of this conviction. First, the principle contended for by the State seems inherently boundless. How is one to distinguish this from any other offensive word? Surely the State has no right to cleanse public debate to the point where it is grammatically palatable to the most squeamish among us. Yet no readily ascertainable general principle exists for stopping short of that result were we to affirm the judgment below. For, while the particular four-letter word being litigated here is perhaps more distasteful than most others of its genre, it is nevertheless often true that one man's vulgarity is another's lyric. Indeed, we think it is largely because governmental officials cannot make principled distinctions in this area that the Constitution leaves matters of taste and style so largely to the individual.

Additionally, we cannot overlook the fact, because it

is well illustrated by the episode involved here, that much linguistic expression serves a dual communicative function: it conveys not only ideas capable of relatively precise, detached explication, but otherwise inexpressible emotions as well. In fact, words are often chosen as much for their emotive as their cognitive force. We cannot sanction the view that the Constitution, while solicitous of the cognitive content of individual speech, has little or no regard for that emotive function which, practically speaking, may often be the more important element of the overall message sought to be communicated. Indeed, as Mr. Justice Frankfurter has said, "[o]ne of the prerogatives of American citizenship is the right to criticize public men and measures—and that means not only informed and responsible criticism but the freedom to speak foolishly and without moderation." *Baumgartner* v. *United States*, 322 U. S. 665, 673–674 (1944).

Finally, and in the same vein, we cannot indulge the facile assumption that one can forbid particular words without also running a substantial risk of suppressing ideas in the process. Indeed, governments might soon seize upon the censorship of particular words as a convenient guise for banning the expression of unpopular views. We have been able, as noted above, to discern little social benefit that might result from running the risk of opening the door to such grave results.

It is, in sum, our judgment that, absent a more particularized and compelling reason for its actions, the State may not, consistently with the First and Fourteenth Amendments, make the simple public display here involved of this single four-letter expletive a criminal offense. Because that is the only arguably sustainable rationale for the conviction here at issue, the judgment below must be

*Reversed.*

MR. JUSTICE BLACKMUN, with whom THE CHIEF JUSTICE and MR. JUSTICE BLACK join.

I dissent, and I do so for two reasons:

1. Cohen's absurd and immature antic, in my view, was mainly conduct and little speech. See *Street* v. *New York*, 394 U. S. 576 (1969); *Cox* v. *Louisiana*, 379 U. S. 536, 555 (1965); *Giboney* v. *Empire Storage Co.*, 336 U. S. 490, 502 (1949). The California Court of Appeal appears so to have described it, 1 Cal. App. 3d 94, 100, 81 Cal. Rptr. 503, 507, and I cannot characterize it otherwise. Further, the case appears to me to be well within the sphere of *Chaplinsky* v. *New Hampshire*, 315 U. S. 568 (1942), where Mr. Justice Murphy, a known champion of First Amendment freedoms, wrote for a unanimous bench. As a consequence, this Court's agonizing over First Amendment values seems misplaced and unnecessary.

2. I am not at all certain that the California Court of Appeal's construction of § 415 is now the authoritative California construction. The Court of Appeal filed its opinion on October 22, 1969. The Supreme Court of California declined review by a four-to-three vote on December 17. See 1 Cal. App. 3d, at 104. A month later, on January 27, 1970, the State Supreme Court in another case construed § 415, evidently for the first time. *In re Bushman*, 1 Cal. 3d 767, 463 P. 2d 727. Chief Justice Traynor, who was among the dissenters to his court's refusal to take Cohen's case, wrote the majority opinion. He held that § 415 "is not unconstitutionally vague and overbroad" and further said:

> "[T]hat part of Penal Code section 415 in question here makes punishable only wilful and malicious conduct that is violent and endangers public safety and order or that creates a clear and present danger that others will engage in violence of that nature.

". . . [It] does not make criminal any nonviolent act unless the act incites or threatens to incite others to violence . . . ." 1 Cal. 3d, at 773–774, 463 P. 2d, at 731.

*Cohen* was cited in *Bushman*, 1 Cal. 3d, at 773, 463 P. 2d, at 730, but I am not convinced that its description there and *Cohen* itself are completely consistent with the "clear and present danger" standard enunciated in *Bushman*. Inasmuch as this Court does not dismiss this case, it ought to be remanded to the California Court of Appeal for reconsideration in the light of the subsequently rendered decision by the State's highest tribunal in *Bushman*.

MR. JUSTICE WHITE concurs in Paragraph 2 of MR. JUSTICE BLACKMUN'S dissenting opinion.